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# As the Water Grinds the Stone: Comparison of Represented and Self-represented Appellant Populations in the Federal Court of Appeal

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Résumé de l'article

Le présent article rend compte d'une enquête quantitative et statistiquement fiable visant 552 instances devant la Cour d'appel fédérale; il s'agit d'appels déposés par des appelants représentés et non représentés qui, en 2016 ou en 2017, ont interjeté appel de décisions de la Cour fédérale ou de la Cour canadienne de l'impôt. Les appels interjetés par la Couronne, par les appelants représentés autres que la Couronne et par les appelants non représentés ont affiché des différences marquées en ce qui concerne la fréquence à laquelle les appels ont été accueillis et la façon dont il a été mis fin aux appels. Presque la moitié des appels interjetés par la Couronne ont été accueillis, mais moins d'un appelant non représenté sur vingt a connu un quelconque succès. Alors que 70 % des appels pris en charge par des avocats ont été menés à bien, moins de 40 % des instances dans lesquelles l'appelant n'était pas représenté ont abouti à une audience complète. Les appels incomplets interjetés par des appelants non représentés prenaient habituellement fin avant l'étape du dossier d'appel, généralement par abandon ou par désistement. Le temps nécessaire pour mener l'appel à bien était similaire tant pour les appelants représentés que pour les appelants non représentés. La fréquence élevée de dossiers posant problème qui a été observée chez les appelants non représentés appuie l'hypothèse selon laquelle un « effet de distillation » mène à une concentration de plaideurs abusifs devant les tribunaux d'appel.

Une enquête haute résolution portant sur les sous-groupes d'appelants non représentés a révélé des différences au sein de la population globale d'appelants non représentés. Les appelants non représentés devant la Cour fédérale étaient différents de ceux qui se sont présentés devant la Cour canadienne de l'impôt. Les premiers étaient beaucoup plus susceptibles d'avoir des antécédents de poursuites abusives, tandis que les derniers se désistaient volontairement de leurs appels et ne faisaient jamais l'objet des mesures de gestion des plaideurs vexatoires de la Cour d'appel fédérale. Dans les instances dans lesquelles l'appelant n'était pas représenté qui ont pris fin prématurément ou qui ont été prises en charge par des personnes faisant l'objet de restrictions d'accès au tribunal, un nombre considérablement plus élevé de documents et de dossiers ont été déposés. Les mesures de gestion des litiges n'ont pas réduit la charge de travail du greffe et du tribunal occasionnée par les appelants non représentés faisant l'objet de restrictions d'accès au tribunal. De telles observations remettent en question la modélisation des plaideurs non représentés comme population unique ayant des caractéristiques uniformes.

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## As the Water Grinds the Stone: Comparison of Represented and Self-represented Appellant Populations in the Federal Court of Appeal

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*This article reports a quantitative and statistically reliable population investigation of 552 Federal Court of Appeal proceedings that were appeals by represented and self-represented appellants who, in 2016 or 2017, appealed decisions of the Federal Court or Tax Court of Canada. Appeals by the Crown, non-Crown represented appellants, and self-represented appellants exhibited markedly different frequencies at which appeals were granted, and patterns for how appeals were terminated. Nearly half of Crown appeals were granted, but less than one in twenty self-represented appellants had any degree of success. While 70% of appeals conducted by lawyers completed the appeal process, less than 40% of self-represented appellant proceedings resulted in a full appeal panel hearing. Incomplete appeals by self-represented appellants usually terminated prior to the appeal record stage, and typically were either abandoned or discontinued. The time required to complete appeals for represented and self-represented appellants is similar. The high observed frequency of problematic litigation records for self-represented appellants supports the hypothesis that a “Distillation Effect” is concentrating abusive litigants in appellate forums.*

*High resolution investigation of self-represented appellant subgroups revealed differences within the overall self-represented appellant population. Self-represented appellants emerging from the Federal Court and Tax Court of Canada are different populations. The former were much more likely to have an abusive litigation history, while the latter voluntarily discontinued appeals, and were never subject to Federal Court of Appeal vexatious litigant management steps. Self-represented appellant proceedings that terminated prematurely or that were conducted by persons who are subject to court access restrictions had significantly more filed documents and docket records. Litigation management steps did not reduce the Registry and Court workload resulting from self-represented appellants subject to court access restrictions. These observations challenge modelling self-represented litigants as a single population with uniform characteristics.*

*Le présent article rend compte d’une enquête quantitative et statistiquement fiable visant 552 instances devant la Cour d’appel fédérale; il s’agit d’appels déposés par des appelants représentés et non représentés qui, en 2016 ou en 2017, ont interjeté appel de décisions de la Cour fédérale ou de la Cour canadienne de l’impôt. Les appels interjetés par la Couronne, par les appelants représentés autres que la Couronne et par les appelants non*

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représentés ont affiché des différences marquées en ce qui concerne la fréquence à laquelle les appels ont été accueillis et la façon dont il a été mis fin aux appels. Presque la moitié des appels interjetés par la Couronne ont été accueillis, mais moins d'un appelant non représenté sur vingt a connu un quelconque succès. Alors que 70 % des appels pris en charge par des avocats ont été menés à bien, moins de 40 % des instances dans lesquelles l'appelant n'était pas représenté ont abouti à une audience complète. Les appels incomplets interjetés par des appelants non représentés prenaient habituellement fin avant l'étape du dossier d'appel, généralement par abandon ou par désistement. Le temps nécessaire pour mener l'appel à bien était similaire tant pour les appelants représentés que pour les appelants non représentés. La fréquence élevée de dossiers posant problème qui a été observée chez les appelants non représentés appuie l'hypothèse selon laquelle un « effet de distillation » mène à une concentration de plaideurs abusifs devant les tribunaux d'appel.

Une enquête haute résolution portant sur les sous-groupes d'appelants non représentés a révélé des différences au sein de la population globale d'appelants non représentés. Les appelants non représentés devant la Cour fédérale étaient différents de ceux qui se sont présentés devant la Cour canadienne de l'impôt. Les premiers étaient beaucoup plus susceptibles d'avoir des antécédents de poursuites abusives, tandis que les derniers se désistaient volontairement de leurs appels et ne faisaient jamais l'objet des mesures de gestion des plaideurs vexatoires de la Cour d'appel fédérale. Dans les instances dans lesquelles l'appelant n'était pas représenté qui ont pris fin prématurément ou qui ont été prises en charge par des personnes faisant l'objet de restrictions d'accès au tribunal, un nombre considérablement plus élevé de documents et de dossiers ont été déposés. Les mesures de gestion des litiges n'ont pas réduit la charge de travail du greffe et du tribunal occasionnée par les appelants non représentés faisant l'objet de restrictions d'accès au tribunal. De telles observations remettent en question la modélisation des plaideurs non représentés comme population unique ayant des caractéristiques uniformes.

## I. INTRODUCTION

Popular legal academic commentary often reports about the allegedly increasing frequency that persons appear in Canadian courts without lawyer representation. These individuals are commonly called “self-represented litigants” or “SRLs”.<sup>1</sup> The Supreme Court of Canada [SCC] in *Pintea v Johns*<sup>2</sup> endorsed the Canadian Judicial Council *Statement of Principles on Self-represented Litigants and Accused Persons*<sup>3</sup> [*CJC Statement*] that recognizes SRLs are a distinct litigant category, and that court staff and judges have different obligations to this litigant category who have special procedural rights.<sup>4</sup>

<sup>1</sup> “Self-represented litigant” is the usual term used in Canadian jurisprudence and legal commentary. “Litigant in person” is the most common equivalent term in the UK, Australia, New Zealand, and the Republic of Ireland. US jurisprudence usually refers to SRLs as “pro se” litigants.

<sup>2</sup> *Pintea v Johns*, 2017 SCC 23.

<sup>3</sup> Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) [Canadian Judicial Council, “Statement”], online (pdf): [CanadianJudicialCouncil <cjccm.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf>](http://CanadianJudicialCouncil.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf) [perma.cc/RGK3-FWJU].

<sup>4</sup> Jennifer Leitch, “Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process” (2017) 47:1 *Adv Q* 309 argues *Pintea v Johns* confirms a pre-existing progression that Canadian judges recognized SRLs as a special category.

Much has been written about Canadian SRLs, their characteristics, how they conduct their litigation, and the reasons why SRLs appear in courts without lawyers. SRLs are identified as part of an amorphous “access to justice” crisis.<sup>5</sup> Despite the volume of commentary on the subject of SRLs, our knowledge of these people has a surprisingly tenuous foundation.

Until very recently there have been no statistically valid studies of Canadian SRLs or their court activities. Instead, what is purportedly known about Canadian SRLs is largely derived from surveys of court staff and judges, lawyers, and litigants.<sup>6</sup> Surveys are inherently limited by factors such as potential sampling error and bias, reporter knowledge, subjective perceptions, honesty, and limits on what a reporter may know.<sup>7</sup> What these surveys report is not always compatible, but, nevertheless, a kind of “SRL narrative” has coalesced. These claims are for the most part accepted without much apparent scrutiny:

1. SRL numbers are increasing;<sup>8</sup>

<sup>5</sup> Stratas JA recently in *Bernard v Canada (Professional Institute of the Public Service)*, 2020 FCA 211 at paras 25-26 concluded the “access to justice” concept is ill-defined, an “abstract principle”, and “a vague concept that takes on different meanings depending on the context.” Trevor C W Farrow & Lesley A Jacobs, “Introduction: Taking Meaningful Access to Justice in Canada Seriously” in Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) at 6-8 recently observed the “access to justice” concept has changed and gone “through numerous waves of conceptualizing access to justice”. Farrow & Jacobs conclude that the current focus instead ought to be on achieving “meaningful access to justice”, which is a yet even broader concept.

<sup>6</sup> See e.g. Rachel Birnbaum & Nicholas Bala, “Views of Ontario Lawyers on Family Litigants Without Representation” (2012) 63 UNBLJ 99 [Birnbaum, “Views”]; Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, “The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2013) 91:1 Can Bar Rev 67 [Birnbaum, “Rise”]; Lorne D Bertrand, Joanne J Paetsch & Nicholas Bala, “Self-Represented Litigants in Family Law Disputes: Views of Alberta Lawyers” (December 2012), online (pdf): *CanLII* <commentary.canlii.org/w/canlii/2012CanLIIDocs74>; John-Paul E Boyd & Lorne D Bertrand, “Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen’s Bench” (July 2014) [Boyd, “Contrasting Views”], online (pdf): *CanLII* <commentary.canlii.org/w/canlii/2014CanLIIDocs125>; John-Paul E Boyd, Lorne D Bertrand & Joanne J Paetsch, “Self-Represented Litigants in Family Law Disputes: Views of the Judges of the Alberta Court of Queen’s Bench” (April 2014) [Boyd, “Disputes”], online (pdf): *CanLII* <commentary.canlii.org/w/canlii/2014CanLIIDocs127>; Trevor C W Farrow et al, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Toronto and Edmonton: Association of Canadian Court Administrators, 2012) [unpublished], online (pdf): *Association of Canadian Court Administrators* <www.cfcjfcj.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf> [perma.cc/3TWT-33HN]; Anna-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario” (2005) 30:2 Queens LJ 825; Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (May 2013) [unpublished] [Macfarlane, “Report”], online (pdf): *NSRLP* <representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf> [perma.cc/3NLW-9N27].

<sup>7</sup> Reviewed in Floyd J Fowler, *Survey Research Methods*, 4th ed (Thousand Oaks: SAGE, 2009) at 11-17.

<sup>8</sup> See e.g. Canadian Judicial Council, “Statement”, *supra* note 3 at 3; Birnbaum, “Views”, *supra* note 6 at 100, 104, 122; Birnbaum, “Rise”, *supra* note 6 at 71, 75, 91; Bertrand, *supra* note 6 at 1-2, 4, 20; Boyd, “Contrasting Views”, *supra* note 6 at 1, 5-6, 19, 22; Boyd, “Disputes”, *supra* note 6 at 1-2, 6-7, 23; Thomas A Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” (2012) 63 UNBLJ 38 at 40; Deborah Doherty, “Promoting Access to Family Justice by Educating the Self-Represented Litigant” (2012) 63 UNBLJ 86 at 87; Farrow et al, *supra* note 6 at 15-16; Langan, *supra* note 6 at 826-27, 830; Leitch, *supra* note 6; Macfarlane, “Report”, *supra* note 6 at 15; Amy Salyzyn et al, “Literacy Requirements of Court Documents: An Under-Explored Barrier to Access to Justice” (2016) 33 WYAJ 263 at 267-68.

2. SRLs are a family law phenomenon;<sup>9</sup>
3. SRLs do not self-represent out of choice, but because they cannot afford professional legal representation;<sup>10</sup>
4. litigation that involves SRLs is lengthier and more complex, and that stresses already over-taxed Canadian courts;<sup>11</sup>
5. SRLs are “fair-dealers” who want to resolve their disputes using Canadian law, but find legal rules, procedures, and authorities alien, difficult, and complex;<sup>12</sup>
6. SRLs meet with reduced success because SRLs find law and litigation difficult;<sup>13</sup> and
7. only a very few SRLs are “bad apples” who misuse courts and their resources.<sup>14</sup>

What is rarely discussed is that the SRL narrative is grounded on a concealed foundation. SRLs are assumed to be a monolith who share common characteristics, and are essentially the same in different dispute forums and litigation contexts. For example, the *CJC Statement* is essentially a “one size fits all” solution for SRLs and their issues.<sup>15</sup> Similarly, Macfarlane’s 2013 Canadian SRLs survey treated SRLs engaged in different litigation types as a single undivided population with generally similar experiences and characteristics.<sup>16</sup>

Certain information challenges the SRL narrative and the presumption that SRLs are all alike. Quantitative research on SRL populations in other common law nations has concluded there is little to no evidence to support, for example, that SRL numbers are on the rise, or that SRL proceedings typically

<sup>9</sup> See e.g. Birnbaum, “Views”, *supra* note 6 at 100-102; Birnbaum, “Rise”, *supra* note 6 at 71, 75-76, 91; Bertrand, *supra* note 6; Boyd, “Disputes”, *supra* note 6 at 1-2, 26-27; Doherty, *supra* note 8 at 86; Langan, *supra* note 6 at 826-27; Macfarlane, “Report”, *supra* note 6 at 8, 26.

<sup>10</sup> See e.g. Birnbaum, “Views”, *supra* note 6 at 100-102, 104-106; Birnbaum, “Rise”, *supra* note 6 at 71, 75-77, 91-92; Bertrand, *supra* note 6 at 4-5, 20, 23; Boyd, “Contrasting Views”, *supra* note 6 at 6-7, 20, 22-23; Boyd, “Disputes”, *supra* note 6 at 7, 23; Cromwell, *supra* note 8 at 40; Langan, *supra* note 6 at 832, 834-36, 857, 861; Macfarlane, “Report”, *supra* note 6 at 8-9, 12, 39-44; Salyzyn, *supra* note 8 at 267-68.

<sup>11</sup> See e.g. Birnbaum, “Views”, *supra* note 6 at 108-11, 120-21; Birnbaum, “Rise”, *supra* note 6 at 80-81; Bertrand, *supra* note 6 at 7, 11-12, 21-24; Boyd, “Contrasting Views”, *supra* note 6 at 9-12, 20-21, 30; Boyd, “Disputes”, *supra* note 6 at 2, 9-10; Cromwell, *supra* note 8 at 40; Doherty, *supra* note 8 at 86; Langan, *supra* note 6 at 840-41, 857; Leitch, *supra* note 4.

<sup>12</sup> See e.g. Canadian Judicial Council, “Statement”, *supra* note 3 at 3; Boyd, “Disputes”, *supra* note 6 at 26; Farrow et al, *supra* note 6 at 17-21, 29-30; Langan, *supra* note 6 at 828-29, 833, 843-44; Macfarlane, “Report”, *supra* note 6 at 9-11, 53-55, 59-62.

<sup>13</sup> See e.g. Canadian Judicial Council, “Statement”, *supra* note 3 at 1, 3-5, 7, 11; Birnbaum, “Views”, *supra* note 6 at 111-13; Birnbaum, “Rise”, *supra* note 6 at 83-84, 87-89; Boyd, “Disputes”, *supra* note 6 at 11-13, 24, 27-28; Doherty, *supra* note 8 at 86; Langan, *supra* note 6 at 843; Leitch, *supra* note 6; Macfarlane, “Report”, *supra* note 6 at 95-98; Salyzyn, *supra* note 8 at 267-72.

<sup>14</sup> See e.g. Julie Macfarlane & Megan Campbell, “Wrong Diagnosis, Wrong Strategy: Why More Restrictions on Self-Represented Litigants Won’t Work and Aren’t Justified” (4 June 2019), online (blog): *Slaw* <[www.slaw.ca/2019/06/04/wrong-diagnosis-wrong-strategy-why-more-restrictions-on-self-represented-litigants-wont-work-and-arent-justified/](http://www.slaw.ca/2019/06/04/wrong-diagnosis-wrong-strategy-why-more-restrictions-on-self-represented-litigants-wont-work-and-arent-justified/)> [perma.cc/V8UJ-TA76]; NSRLP, “Avoiding Conflation: OPCAs and Self-Represented Litigants” (6 October 2012), online (blog): *NSRLP* <[representingyourselfcanada.com/avoiding-conflation-opcas-and-self-represented-litigants/](http://representingyourselfcanada.com/avoiding-conflation-opcas-and-self-represented-litigants/)> [perma.cc/3842-XABC]; Gerald J Kennedy, “The Alberta Court of Appeal’s Vexatious Litigant Order Trilogy: Respecting Legislative Supremacy, Preserving Access to the Courts, and Hopefully Not to a Fault” (2021) 58:3 *Alta L Rev* 739 at 742, 753, 757; Slatter JA in *Jonsson v Lymer*, 2020 ABCA 167 at para 14 [Lymer] distinguishes between “vexatious litigants” and ill-informed SRLs who litigate in an ineffective and futile manner, and “excessively or passionately” advance their lawsuits.

<sup>15</sup> The *CJC Statement* does acknowledge that subsets of SRLs may have even further needs, for example due to literacy and language: Canadian Judicial Council, “Statement”, *supra* note 3 at 3.

<sup>16</sup> Macfarlane, *supra* note 6.

take longer and have more litigation steps.<sup>17</sup> The choice to retain lawyers has been primarily linked to dispute subject matter, rather than financial constraints.<sup>18</sup> Sandefur reviews that US lawyer clients find legal expenses reasonable or not relevant to dispute resolution.<sup>19</sup>

So, who are Canada's SRLs? Netolitzky recently conducted the first quantitative, statistically valid investigation of a Canadian SRL population, examining SRL appellant activity at the SCC. The results of that research are inconsistent with many components of the SRL narrative:

1. Evidence only supports a modest increase in SCC SRL appellant frequency over the past 20 years.<sup>20</sup>
2. Family subject litigation was a minor SCC SRL dispute type. Torts were the most common SRL candidate appeal subject.<sup>21</sup>
3. No evidence supported the model that many SRLs first retained lawyers, ran out of money, and then acted on their own. The most common observed pattern was SRLs were always unrepresented.<sup>22</sup>
4. SRLs were not blocked by SCC procedural obstacles or limitations period deadlines.<sup>23</sup>
5. Most SCC SRLs did not seek to apply principles of Canadian law, but, instead, were in court to enforce their "rights". SRLs broadly rejected Canadian courts and judges as invalid, biased, unfair, and even criminal.<sup>24</sup>
6. SRLs met with very little success, but that near universal failure is explained by the nature and substance of their appeals.<sup>25</sup>
7. SRLs operating at the SCC were disproportionately likely to have a record of abusive litigation and to be subject to court access restrictions. Negative litigation characteristics are linked to SCC litigation volume.<sup>26</sup>
8. A substantial proportion of SCC SRLs (38.5%) either: 1) were subject to court orders as a consequence of mental health issues, 2) were found by a court to exhibit delusional thinking, 3) self-identified as having mental health issues or brain or neurological injury, or 4) exhibited an expanding dispute and litigation pattern characteristic of the querulous paranoia psychiatric disorder.<sup>27</sup>

<sup>17</sup> John M Greacen, "An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts - Testing our Stereotypes against Real Data" (2002) 41:3 *Judges' J* 32 at 33-35 [Greacen, "Impact"]; John M Greacen, "Self-Represented Litigants, the Courts, and the Legal Profession, Myths and Realities" (2014) 52:4 *Fam Ct Rev* 662 at 667-68 [Greacen, "Myths"]; Mark D Gough & Emily S Taylor Poppe, "(Un)Changing Rates of Pro Se Litigation in Federal Court" (2020) 45:3 *L & Social Inquiry* 567; Liz Richardson, Genevieve Grant & Janina Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Australasian Institute of Judicial Administration, 2018) at ii-iv, 29-51 [Richardson, "Impacts"], online (pdf): [AIJA <aija.org.au/wp-content/uploads/2018/11/10803\\_SRL\\_Enviro-Scan-Report\\_WEB3.pdf>](http://aija.org.au/wp-content/uploads/2018/11/10803_SRL_Enviro-Scan-Report_WEB3.pdf) [perma.cc/9UG6-ANGG]; Richard Moorhead & Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs, 2005) at 60-61, 111-12, 125-27, 251-52, online (pdf): [ORCA <orca.cf.ac.uk/2956/1/1221.pdf>](http://orca.cf.ac.uk/2956/1/1221.pdf) [perma.cc/SQF4-7P42].

<sup>18</sup> Greacen, "Myths", *ibid* at 664; Moorhead, *ibid* at 250; Rebecca L Sandefur, "What We Know and Need to Know about the Legal Needs of the Public" (2016) 67 *SC Law Rev* 443 at 443-44, 449-50; Bridgette Toy-Cronin, "I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts" (2016) 2016:4 *NZLR* 723 at 754.

<sup>19</sup> Sandefur, *ibid* at 450.

<sup>20</sup> Donald J Netolitzky, "Enforcement of Leave to Appeal Limitations Periods at the Supreme Court of Canada" (2021) 20 *SCLR* 165 at 166 [Netolitzky, "Limitations"].

<sup>21</sup> Donald J Netolitzky, "The Walking Wounded: Failure of Self-Represented Litigants in 2017 Supreme Court of Canada Leave to Appeal Applications" (2021) 58:4 *Alta L Rev* 837 at 870-71 [Netolitzky, "Applications"].

<sup>22</sup> *Ibid* at 865-66.

<sup>23</sup> *Ibid* at 888-90; Netolitzky, "Limitations", *supra* note 20 at 180-81.

<sup>24</sup> Donald J Netolitzky, "The Grim Parade: Supreme Court of Canada Self-Represented Appellants in 2017" (2021) 59:1 *Alta L Rev* at 151-156 [Netolitzky, "Appellants"].

<sup>25</sup> Netolitzky, "Applications", *supra* note 21 at 890-95.

<sup>26</sup> Netolitzky, "Appellants", *supra* note 24 at 158-61; Donald J Netolitzky, "Worn Out Faces: Repeat Self-Represented Litigants at the Supreme Court of Canada" (2022) 55:1 *UBC L Rev* (in press) at IV(E) (Netolitzky, "Repeat Litigants").

<sup>27</sup> Netolitzky, "Appellants", *supra* note 24 at 161-63

9. SRLs who repeatedly conducted SCC leave proceedings frequently switched litigation targets.<sup>28</sup>

The Netolitzky SCC investigation<sup>29</sup> supports the “Distillation Effect” hypothesis<sup>30</sup> proposed by Justice Yves-Marie Morissette of the Quebec Court of Appeal: abusive and vexatious litigants are over-represented in appeal bodies because these SRLs are more likely to pursue fruitless appeals. The Ontario Court of Appeal has recently adopted Justice Morissette’s observations and their implications.<sup>31</sup>

SRLs at the SCC have now been characterized in detail, but there is no reason to presume any other Canadian SRL population will share their identified attributes or operate in the same manner. The next step is to acquire additional comparator population data, and evaluate what SRL characteristics remain the same, and which are different. That is the overall goal of this study, the first investigation of how Canadian SRLs operate in an intermediate appeal court.

This investigation applied the docket and document-based techniques demonstrated in the Netolitzky SCC study to investigate SRLs operating at the Federal Court of Appeal [FCA] who:

1. initiated proceedings in 2016 and 2017, and
2. appealed a decision of the Federal Court [FC] or the Tax Court of Canada [TCC].

First, specific information was extracted from FCA docket records, reported court decisions, and other legal information resources. With that data acquired, analysis had two foci.

The first focus was a “side-by-side” comparison of SRL appeals with homologous appeals initiated by the Crown and non-Crown represented appellants. The *CJC Statement* states SRLs operate differently than other litigants. This article’s parallel investigation of different appellant types permits measurement and statistical testing of when and how self-represented appellants operating at the FCA are (or are not) different from represented appellants. That answers questions including:

1. What are the outcomes of SRL and represented litigant proceedings, including those proceedings that terminate prior to a full hearing?
2. How long do SRLs and represented litigants take to complete steps in the appeal process?
3. Are any of those litigation steps obstacles?
4. Is the volume of court file documents and records different for SRLs and represented litigants?

That same data also permits a focused examination of a second question: are measurable litigation characteristics of FCA SRLs linked to whether those SRLs have been identified by courts as engaging in abusive litigation? The Netolitzky SCC study detected an over-representation of abusive SCC litigants, but did not provide much information on how those SRLs *conduct* legal proceedings. This article is the first to measure what litigation patterns, if any, are associated with what courts have classified as inappropriate and abusive SRL activities.

<sup>28</sup> Netolitzky, “Repeat Litigants”, *supra* note 26 at IV(C).

<sup>29</sup> Netolitzky, “Appellants”, *supra* note 24 at 161-63; Netolitzky, “Repeat Litigants”, *supra* note 26 at IV(E).

<sup>30</sup> Yves-Marie Morissette, “Querulous and Vexatious Litigants as a Disorder of a Modern Legal System” (2019) 24:3 Can Crim L Rev 265 at 285, 306, footnote 26; Donald J Netolitzky, “Comment on Y.-M. Morissette, ‘Querulous and Vexatious Litigants as a Disorder of a Modern Legal System’” (2019) 24:3 Can Crim L Rev 251 at 257 [Netolitzky, “Comment”].

<sup>31</sup> *Lochner v Ontario Civilian Police Commission*, 2020 ONCA 720 at para 17 [Lochner].

## II. METHODOLOGY

This study investigated three FCA comparator appeal groups, all FCA appeals initiated in 2016-2017 of:

1. interlocutory and final FC trial decisions,
2. interlocutory and final FC judicial reviews, and
3. TCC appeals.

Together, these appeals form the “Study Appeals”.

The three appeal type comparator groups were selected to evaluate appeals that may potentially exhibit different litigation characteristics, and where those groupings were of sufficient number to provide a statistically useful data pool.

The 2016 and 2017 year cohorts were selected to ensure enough time had passed, post-filing, so that the appeal process had completed, and to minimize potential court process anomalies and delays that resulted from modified FCA court operations in 2020 that responded to the COVID-19 pandemic.<sup>32</sup>

For convenience and ease of reference, individual Study Appeals are identified by the last name or the organization name of the first named appellant, followed by the docket number assigned by the FCA Registry. For example, Lee A-221-17 identifies the *John Mark Lee Jr v Correctional Service of Canada* appeal, filed on July 25, 2017, and that was assigned FCA docket A-221-17.

### A. Identification of Study Appeals

FCA matters are assigned docket numbers in the format A-[year-specific appeal index number]-[year]. Index numbers are roughly sequential, and therefore relate to the date that an FCA appeal is filed. For example, A-4-14 is the fourth FCA appeal docket in 2014, with the file opened on January 2, 2014.

Candidate Study Appeals were identified using the FC website court files search form “Search by court number” function.<sup>33</sup> Docket numbers in the format A-[X]-16 and A-[X]-17 were entered, incrementing X by one until no further appeal dockets were identified. This procedure identified A-1-16 to A-479-16 and A-1-17 to A-431-17 as potential Study Appeals.

Not all docket number searches located a corresponding FCA record. For example, a docket number search for A-180-17 generated the response: “No data available in table”. “No data” files are plausibly FCA court records that are entirely sealed, for example due to security restrictions.<sup>34</sup> “No data” (N=5)

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<sup>32</sup> On March 16, 2020, the FCA adopted modified and restricted procedures in response to the developing COVID-19 pandemic: Marc Noël, “Update on Court operations in light of COVID-19” (16 March 2020), online (pdf): *Federal Court of Appeal* <[www.fca-caf.gc.ca/fca-caf/pdf/Notice%20-%20Covid-19%20-%20EN%20-%20March%2016%202020%20modified%20March%2017.pdf](http://www.fca-caf.gc.ca/fca-caf/pdf/Notice%20-%20Covid-19%20-%20EN%20-%20March%2016%202020%20modified%20March%2017.pdf)> [perma.cc/FXT5-RU9F]. FCA operations were subsequently expanded on June 11, 2020 (Marc Noël, “Gradual phase-out of Suspension Period: COVID-19” (11 June 2020), online (pdf): *Federal Court of Appeal* <[www.fca-caf.gc.ca/fca-caf/pdf/Notice%20-%20Covid-19%20-%20EN%20-%20deadlines%20-%20June%2011%202020%20FINAL.pdf](http://www.fca-caf.gc.ca/fca-caf/pdf/Notice%20-%20Covid-19%20-%20EN%20-%20deadlines%20-%20June%2011%202020%20FINAL.pdf)> [perma.cc/HPL2-XBM6]) and September 1, 2020 (Marc Noël, “Resumption of in person hearings and the effect of the Time Limits and Other Periods Act (COVID-19)” (1 September 2020), online (pdf): *Federal Court of Appeal* <[www.fca-caf.gc.ca/fca-caf/pdf/Notice-Covid-19-EN-Sept-1-2020-FINAL.pdf](http://www.fca-caf.gc.ca/fca-caf/pdf/Notice-Covid-19-EN-Sept-1-2020-FINAL.pdf)> [perma.cc/Z7HD-8CL3]).

<sup>33</sup> Online: *Federal Court* <[www.fct-cf.gc.ca/en/court-files-and-decisions/court-files#cont](http://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files#cont)> [perma.cc/3JE4-AREQ].

<sup>34</sup> FCA files may not be available for example pursuant to the *Canada Evidence Act*, RSC 1985, c C-5, *Immigration and Refugee Protection Act*, SC 2001, c 27, and *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, see “Policy on Public and Media Access”, online: *Federal Court* <[www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access](http://www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access)> [perma.cc/4B8P-UDL2].



candidate appeals were eliminated from the study. Other FCA dockets, for example A-163-17, indicated the “Nature of Proceeding” as “File cancelled - Appeal”. These candidate appeals (N=36) were also eliminated from the study.

The online docket records of the remaining 869 candidate appeals were reviewed. FCA dockets that were not part of the three comparator groups were eliminated, leaving:

268 FCA appeals of FC trial proceedings,  
101 FCA appeals of FC judicial reviews, and  
249 FCA appeals of TCC appeals.

Review of the remaining candidate appeal docket records, and in some cases reported judgments, determined that some candidate Study Appeals were not independent and separate actions. Some appeal proceedings were either consolidated, or were instances where only a lead appeal was pursued, and then the result of that lead appeal determined the outcome of multiple actions. Only lead appeals were entered as Study Appeals in these instances.<sup>35</sup> Most of these consolidated or lead appeal scenarios involved multiple TCC matters that had the same factual and legal issues.<sup>36</sup>

A total of seven appeals that were initiated in 2016 and 2017 remained unresolved at the time of this study.<sup>37</sup> These candidate appeals were eliminated from the Study Appeals since one objective of this investigation is to track how FCA appeals move through the appeal process until a final result is obtained. After these steps a total of 552 Study Appeals remained:

263 FCA appeals of FC trial proceedings,  
98 FCA appeals of FC judicial reviews, and  
191 FCA appeals of TCC appeals.

The 552 Study Appeals were then investigated and characterized.

<sup>35</sup> Minister of National Revenue A-66-16 incorporates Minister of National Revenue A-73-16. Galego A-180-16 incorporates Montminy A-180-16, Latulippe A-182-16, Dutil A-183-16, Hache A-184-16, Beauchamp A-185-16, and Benoit A-186-16. Durocher A-372-16 incorporated Vallerand A-370-16, Blondeau A-371-16, Ringuet A-373-16, Lagarde A-374-16, Vallerand A-375-16, Ringuet A-376-16, Bussiers A-377-16, Berube A-378-16, Sansoucy A-379-16, Lagarde A-380-16, Monette A-381-16, Blondeau A-382-16, Labonte A-383-16, Lagarde A-384-16, and Lagarde A-385-16. Her Majesty the Queen A-412-16 incorporated Her Majesty the Queen A-410-16 and Her Majesty the Queen A-411-16. Cassan A-304-17 incorporated Sang A-302-17, Gordon A-303-17, Tilatti A-305-17, Platnick A-306-17, and Chu A-307-17. The Information Minister of Canada A-311-17 incorporates The Prime Minister of Canada A-313-17. Armstrong A-375-17 incorporates George A-355-17, Cairns A-356-17, Hayhoe A-357-17, Carpenter A-358-17, Loubier A-359-17, Sonik A-360-17, Martens A-361-17, Samadian A-362-17, Thalen A-363-17, Thompson A-364-17, Fraser A-365-17, Cushnie A-366-17, Gunning A-367-17, Martens A-368-17, Paucio A-369-17, Paucio A-370-17, Prinzen A-371-17, Wiens A-372-17, Flegg A-373-17, Armstrong A-374-17, George A-376-17, Fast A-377-17, Pike A-378-17, Koshe A-379-17, Allen A-380-17, and Wiens A-381-17. Kruger Incorporated A-296-15 incorporated Kruger Incorporated A-195-16 and was eliminated from the Study Population entirely.

<sup>36</sup> See e.g. *Durocher v Canada*, 2016 FCA 299 decided a total of 16 appeals, with Durocher A-372-16 acting as the lead case for 15 other appeals. All 16 FCA appeals involved the same capital gains income tax issue. The same lead case approach was used at the TCC: *Durocher v The Queen*, 2015 TCC 297.

<sup>37</sup> Weinberg Family Trust A-59-16, Attorney General of Canada A-366-16, Rameau A-48-17, Her Majesty the Queen A-96-17, Nova Chemicals Corp A-150-17, White Bear First Nation A-182-17, and Cassan A-304-17. In certain instances, these unresolved appeals are not the result of judicial delay. Instead, some of these proceedings have been paused, e.g. Cassan A-304-17 has been held in abeyance in light of ongoing settlement negotiations.

## B. Investigation of Study Appeals

FCA online docket records provided most of the information to characterize the Study Appeals. In certain instances, additional information was obtained via review of reported decisions, and from the TCC's<sup>38</sup> and SCC's<sup>39</sup> online docket records.

Appeal-specific information that was obtained and recorded included:

1. the FCA docket number;
2. whether the FCA appeal is an appeal of an FC trial proceeding, an FC judicial review, or a TCC appeal;
3. the docket number(s) of the lower court proceedings;
4. the appeal style of cause;
5. whether the appellant was the Crown, a non-Crown appellant represented by a lawyer, or a self-represented appellant;
6. the dates that:
  - a) the appeal was filed,
  - b) the appeal book or final supplementary appeal book was filed,
  - c) the appeal was heard, and
  - d) a final decision was issued, or the proceeding was otherwise terminated;
7. the outcome of the appeal;
8. the neutral citation of the decision that determined the outcome of the appeal, if any;
9. whether the decision that concluded the appeal indicated the successful party received costs, and, if available, the quantum of that award;
10. whether leave was sought to appeal to the SCC from the FCA proceeding;
11. the number of documents on the appeal docket; and
12. the number of records in the appeal docket.

Cross appeal information and results were not recorded.

Most Study Appeal information collection was simple and routine. FCA online docket records are usually detailed. Most recorded data was simply transcribed from the docket record, or readily identified by reading online docket entries.

Appellant type was identified by the style of cause and the "Additional information" appeal page. For example, Crook A-54-17 "Additional information" identifies the appellant "Party Name" as "CROOK, WILLIAM HAMILTON", and for "Solicitor" reports "Not represented/Non représenté". This notation identified the appellant Crook as an SRL.

Respondent type was not recorded for two reasons. First, certain Study Appeals include multiple respondent types. Second, while FCA online dockets clearly indicate the appellant type, parallel entries do not exist for respondents. Reported FCA decisions specify respondent representation type, but reported decisions were only available for somewhat over half of the Study Appeals.

The lack of reported decisions also meant it was not feasible to further subdivide or categorize the Study Appeal types beyond the FCA docket classification information.

An appeal was considered granted if any part of the appeal was successful.

The recorded dates were used to calculate the time required in days for an appeal to progress through appeal process stages.

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<sup>38</sup> Data was obtained using the TCC website search engine, online: *Tax Court of Canada* <[www.tcc-cci.gc.ca/en/pages/find-a-court-file](http://www.tcc-cci.gc.ca/en/pages/find-a-court-file)> [perma.cc/HJK9-S2FK].

<sup>39</sup> Data was obtained using the SCC Case Information search engine, online: *Supreme Court of Canada* <[scc-csc.ca/case-dossier/info/search-recherche-eng.aspx](http://scc-csc.ca/case-dossier/info/search-recherche-eng.aspx)> [perma.cc/Q5JB-KBXV].

The number of documents in a given appeal docket was obtained from the docket “Recorded Entry Information” webpage by identifying the highest numbered “Doc” entry. The same webpage indicated the number of records in a docket. For example, Crook A-54-17 included 22 documents and 43 records.

### C. Investigation of Study Self-represented Appellants

The same sources used to characterize Study Appeals were also used to collect additional information that described self-represented appellants. Name-based Google Internet searches that referenced reliable sources, such as mainstream media or professional body disciplinary records, sometimes confirmed that litigation related to the same individual.<sup>40</sup>

Variables recorded to describe these SRLs included:

1. the self-represented appellant’s name;
2. information concerning the self-represented appellant’s FCA matter(s) initiated in 2016 and 2017;
3. the number of SCC leave applications filed in any year by the self-represented appellant; and
4. whether a court decision concluded the self-represented appellant had engaged in abusive litigation, and/or imposed court or tribunal gatekeeping restrictions that require the self-represented appellant obtain permission prior to taking a dispute litigation step.

Litigation was presumed to involve the same individual if the two candidate litigants had the same first and last name, and also a common middle initial or middle name, or if litigants with the same first and last name were linked by other information.<sup>41</sup>

Whether a self-represented appellant was subject to court or tribunal access restrictions involved review of reported court and tribunal decisions and court docket records for instances where gatekeeping steps were imposed on the self-represented appellant so that the self-represented appellant must obtain court or tribunal permission prior to taking designated litigation steps. A simple statement that a person was “vexatious” or “querulous” did not satisfy this criterion. Registries of persons subject to court access restrictions in Alberta<sup>42</sup> and Quebec provincial courts<sup>43</sup> were also searched. These are the only two jurisdictions with publicly accessible lists of persons subject to court access restrictions.

A court proceeding determined a self-represented appellant had engaged in abusive litigation when:

1. a court or tribunal decision concluded that the self-represented appellant’s dispute activities were “abusive”, an “abuse of process”, “frivolous”, “querulous”, or “vexatious”, or otherwise misused court processes;

<sup>40</sup> For example, a Google Internet search conducted for Robert Harold Keenan revealed a number of other cases in which the individual was involved that, when cross-referenced with other professional conduct decisions, confirmed he had engaged in a course of abusive litigation: *Rogers, Re*, 2013 ABASC 484, online (pdf): *Alberta Securities Commission* <[www.albertasecurities.com/-/media/ASC-Documents-part-1/Notices-Decisions-Orders-Rulings/Enforcement/2019/01/ROGERS-John-Dale-DECISION-2013-10-30-4667280-1.ashx?la=en&hash=C4B293E464E983811F9DCDAF878F64CD](http://www.albertasecurities.com/-/media/ASC-Documents-part-1/Notices-Decisions-Orders-Rulings/Enforcement/2019/01/ROGERS-John-Dale-DECISION-2013-10-30-4667280-1.ashx?la=en&hash=C4B293E464E983811F9DCDAF878F64CD)> [perma.cc/6GKP-UQMM].

<sup>41</sup> See Netolitzky, “Appellants”, *supra* note 24 at 129.

<sup>42</sup> The Alberta registry is operated by Alberta Resolution and Court Administration Services. Lawyers may request that Court Clerks check whether a person is listed in this registry.

<sup>43</sup> Online: *Justice Quebec* <[justice.gouv.qc.ca/en/programs-and-services/registers/public-registry-of-litigants-subject-to-authorization-by-the-superior-court-of-quebec](http://justice.gouv.qc.ca/en/programs-and-services/registers/public-registry-of-litigants-subject-to-authorization-by-the-superior-court-of-quebec)> [perma.cc/SE8K-332P].

2. pleadings or applications by the self-represented appellant were struck out because that litigation was on its face hopeless, for example under Ontario *Rule 2.1*,<sup>44</sup> Alberta Court of Queen’s Bench Civil Practice Note No. 7,<sup>45</sup> or per the *Rule in kisikawpimootewin*<sup>46</sup> that the filing did not permit a meaningful response;
3. a court ordered elevated costs against the self-represented appellant in response to litigation misconduct;
4. a self-represented appellant was subject to court or tribunal access restrictions;
5. a court or tribunal removed or prohibited a self-represented appellant from acting as a litigation or dispute representative in a third-party’s litigation for bad conduct;
6. the self-represented appellant employed Organized Pseudolegal Commercial Argument<sup>47</sup> litigation strategies or motifs; and
7. a court or tribunal decision identified litigation activities that satisfy established court-identified criteria as being abusive,<sup>48</sup> for example a court decision rejected allegations of judicial bias as having no basis, concluded that litigation was a collateral attack or other form of re-litigation, or determined that litigation was conducted for a wrongful and abusive purpose.

The methodology used to determine whether a self-represented appellant has a record of court access restrictions, or has engaged in abusive litigation, has a known defect.<sup>49</sup> This procedure produces “false negatives”, where a self-represented appellant has been the subject of court decisions that are unreported, or otherwise inaccessible, and those decisions either imposed court access restrictions, or identified abusive litigation conduct.

Put another way, some Study Appeal appellants will be incorrectly identified as having no known abusive litigation conduct, when those findings have, in fact, been made. Similarly, some Study Appeal appellants are possibly subject to court access restrictions, but that fact was not detected. In sum, this study very likely underestimates the frequency at which Study Appeals were conducted by SRLs who have problematic litigation histories.

#### D. Statistical Conventions and Analysis

This study uses certain statistical conventions to express data. “N” indicates the number of a total population. “n” indicates the number of individuals or examples in a larger population who possess a characteristic. For example, “77%, n=17” indicates that in a total population of 22 (N), 77% of the population, 17 individuals (n), share a common characteristic.

Mean [*M*] or average indicate the arithmetic mean: the sum of numerical values in a data set divided by N. Median indicates the numerical value in a data set that separates the upper half and lower half of the data set’s numerical values, and so is the “midpoint” value in a sequence of values.

Standard deviation [*SD*] measures the amount of variation or dispersion of a set of values. A low standard deviation indicates that values tend to be close to the mean, while a higher standard deviation indicates that the values are spread over a wider range.

<sup>44</sup> *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, s 2.1.

<sup>45</sup> Court of Queen’s Bench of Alberta Civil Practice Note No. 7 (4 September 2018), online (pdf): [albertacourts.ca <www.albertacourts.ca/docs/default-source/qb/civil-practice-note-7---vexatious-application-proceeding-show-cause-procedure.pdf?sfvrsn=cb2fa480\\_6>](http://albertacourts.ca/docs/default-source/qb/civil-practice-note-7---vexatious-application-proceeding-show-cause-procedure.pdf?sfvrsn=cb2fa480_6) [perma.cc/EF3E-WSPD]; *Unrau v National Dental Examining Board*, 2018 ABQB 874.

<sup>46</sup> *Unrau v National Dental Examining Board*, 2019 ABQB 283 at paras 626-30 [*Unrau* #2].

<sup>47</sup> *Meads v Meads*, 2012 ABQB 571; *Unrau* #2, *ibid* at paras 178-99.

<sup>48</sup> *Unrau* #2, *supra* note 47; *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685, 59 OR (2d) 353 (Hcj); *Lochner*, *supra* note 32 at paras 19-20.

<sup>49</sup> Netolitzky, “Appellants”, *supra* note 24 at 158-60.

The statistical relationship between certain Study population characteristics was evaluated with the chi-squared ( $\chi^2$ ) test using a 0.05 significance ( $p$ ) level. The chi-squared test calculates the probability ( $p$ ) that the different frequencies that two or more populations exhibit characteristics is the result of random chance.

The 0.05 significance threshold means the probability that random chance could account for observed inter-population characteristic differences is 5%, or 1 in 20. If  $p$  is greater than 0.05 then the chi-squared test concludes that random chance is a possible basis for the observed differences. For example, if  $p$  were 0.0035, then the probability that observed population characteristic differences were the result of random chance is 0.35%.  $p$  of 0.0035 falls below the 0.05 significance threshold, and represents a statistically significant difference between the populations.

The two-tailed Student's  $t$ -Test was used to evaluate the statistical relationship between certain Study Appeal and Study Appellant population characteristics that exhibit a "normal distribution": where the frequency of data is distributed around a central mean in a "bell-shaped" pattern. The  $t$ -Test determines the likelihood that differences between two data sets, each with a normal distribution, are statistically unlikely to be the product of random chance. As with chi-squared tests,  $t$ -Tests were conducted using a 0.05 significance level. A  $t$ -Test  $p$  score of less than 0.05 means a statistically significant difference exists between the normal distributions of a characteristic for two populations.

### III. RESULTS

#### A. Federal Court of Appeal Activity in 2016-2017

Search of the FCA online dockets identified a total of 910 potential candidate FCA appeals: 479 appeals initiated in 2016, and 431 appeals initiated in 2017.<sup>50</sup> Table 1 summarizes the 910 docket records identified:

	2016	2017	Total	%
<b>Federal Court Proceedings</b>	<b>198</b>	<b>171</b>	<b>372</b>	<b>40.9</b>
Federal Court Trials	147	121	268	29.5
Interlocutory Appeals	45	30	75	8.2
Final Decision Appeals	102	91	193	21.2
Federal Court Judicial Reviews	51	53	104	11.4
Interlocutory Judicial Review Appeals	9	7	16	1.8
Final Judicial Review Decision Appeals	42	46	88	9.7
<b>Tax Court of Canada Appeals</b>	<b>126</b>	<b>123</b>	<b>249</b>	<b>27.4</b>
<b>Tribunals</b>	<b>95</b>	<b>80</b>	<b>175</b>	<b>19.2</b>
Canada Agriculture Product Act Review Tribunal	5	1	6	0.7
Canada Industrial Relations Board	15	5	20	2.2
Canadian International Trade Tribunal	12	14	26	2.9
Canadian Radio and Telecommunications Commission	7	2	9	1.0
Canadian Transportation Agency	8	8	16	1.8
Competition Tribunal	3	2	5	0.6
Copyright Board	3	5	8	0.9
Customs Act	0	1	1	0.1
Employment Insurance Act Umpire	1	2	3	0.3
National Energy Board	8	12	20	2.2
Pension Appeal Board	2	4	6	0.7
Public Service Labour Relations Board	26	20	46	5.1
Social Security Tribunal	0	2	2	0.2
Special Import Measures Act	5	2	7	0.8
<b>Others</b>	<b>60</b>	<b>54</b>	<b>114</b>	<b>12.5</b>
File Cancelled	14	22	36	4.0
No Data	1	4	5	0.5
Others	45	28	73	8.0
<b>Total</b>	<b>479</b>	<b>431</b>	<b>910</b>	<b>100.0</b>

Table 1 - Number and frequency of FCA proceedings types in 2016-2017. "File Cancelled" is the number of FCA proceedings with FCA online docket entries of that type. "No Data" are the number of FCA proceedings where a docket number-based search led to no information. "Others" are FCA matters

<sup>50</sup> These values generally match statistics published by the FCA, however that Court appears to measure year ends in a different manner than this study: CAS, *2018-19 Annual Report* at 17, online (pdf): *Courts Administration Service* <[www.cas-satj.gc.ca/en/publications/ar/2018-19/pdf/CAS\\_2018-19\\_Annual%20Report\\_EN\\_Web.pdf](http://www.cas-satj.gc.ca/en/publications/ar/2018-19/pdf/CAS_2018-19_Annual%20Report_EN_Web.pdf)> [perma.cc/XPD5-VGBE].

with that designation for the “Nature of Proceeding” online docket entry, and appears to collect miscellaneous matters, or matters that were not properly before the Court.<sup>51</sup>

The proportions of different FCA appeal types are comparable between 2016-2017. The three FCA appeal type comparator groups that became the Study Appeals represent 61% (n=618) of the FCA’s appeal workload initiated in 2016-2017.

## B. Study Appeal Outcomes

Most Study Appeals were unsuccessful. Only 17.6% (n=97) of Study Appeals were granted in whole or in part. Of unsuccessful appeals, 61.2% (n=338) were dismissed by an FCA ruling, and 21.2% (n=117) were voluntarily discontinued by the appellant.

Figure 1 illustrates the relationship between these three outcomes and appellant type:

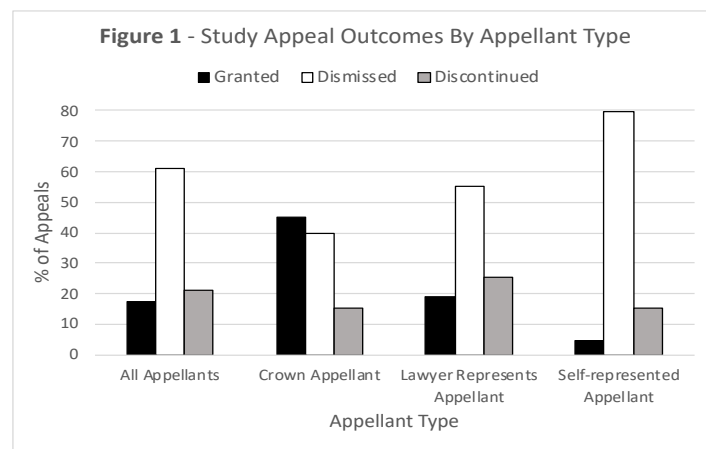


Figure 1 - Relationship between Study Appeal appeal outcomes and representation type. “All Appellants” (N=552) includes appeals by the Crown (“Crown Appellant”, N=60), appeals conducted by non-Crown appellants represented by a lawyer (“Lawyer Represents Appellant”, N=323), and Self-represented Appellants (N=169). “Granted” are appeals that were granted in whole or in part. “Dismissed” are appeals that were dismissed by an FCA ruling. “Discontinued” are proceedings voluntarily discontinued by the appellant.

The three appellant types exhibit markedly different outcomes. 45% (N=60) of Crown appeals were granted in whole or in part. Only 4.7% (N=169) of SRL appeals met with any success. The different outcomes for the three appellant types show high statistical relevance:  $\chi^2(4, N=552)=64.3, p<0.00001$ .

Table 2 evaluates whether litigation outcomes for the three appellant types in the three Study Appeal comparator groups exhibit statistically different outcomes:

<sup>51</sup> For example Estate of James Flynn A-423-17 that was transferred to the FC.

**Table 2 - Study Appeal Outcomes for Different Appeal Types and by Representation**

	Crown Appellant		Lawyer Represents Appellant		Self-represented Appellant		All Appellants	
	N	%	N	%	N	%	N	%
<b>Federal Court Trials</b>								
Granted	15	55.6%	32	18.1%	0	0%	47	17.9%
Dismissed	8	29.6%	90	50.8%	57	96.6%	155	58.9%
Discontinued	4	14.8%	55	31.1%	2	3.4%	61	23.2%
<b>Federal Court Judicial Reviews</b>								
Granted	5	35.7%	13	23.6%	3	10.3%	21	21.4%
Dismissed	5	35.7%	33	60.0%	22	75.9%	60	61.2%
Discontinued	4	28.6%	9	16.4%	4	13.8%	17	17.3%
<b>Tax Court of Canada Appeals</b>								
Granted	7	36.8%	17	18.7%	5	6.2%	29	15.2%
Dismissed	11	57.9%	56	61.5%	56	69.1%	123	64.4%
Discontinued	1	5.3%	18	19.8%	20	24.7%	39	20.4%
N	60		323		169		552	
$\chi^2$	6.4		7.3		18.5		3.24	
<i>p</i> -value	0.168		0.12		0.0099		0.519	
Appeal Type Significant?	N		N		Y		N	

Table 2 - Relationship between Study Appeal appeal outcomes and appeal and representation type. “Granted” appeals are appeals that were granted in whole or in part. “Dismissed” are appeals that were dismissed by an FCA ruling. “Discontinued” are proceedings voluntarily discontinued by the appellant. “ $\chi^2$ ” indicates the  $\chi^2$  statistic when comparing appeals by a given litigant type for the three comparator appeal groups. “*p*-value” indicates the probability that the outcome distribution is the result of random chance. “Appeal Type Significant” indicates whether the chi-square test *p*-value outcome was less than the 0.05 significance threshold.

No significant differences exist in the outcomes of the three Study Appeal comparator groups where the appellant was represented by a lawyer: Table 2-Crown and non-Crown represented appellants. However, the different outcomes for SRLs appealing the three comparator group types are unlikely to be the result of chance. Notably, no SRL (0%, N=59) achieved even partial successful when appealing an FC trial matter decision, despite being the second-largest SRL comparator appeal group population. SRLs experienced maximum success when challenging FC judicial review rulings (10.3%, N=29).

The “Dismissed” category of Study Appeals in Figure 1 and Table 2 combine two subpopulations:

1. Study Appeals that were dismissed after a full appeal hearing by a panel of three FCA justices, and
2. Study Appeals that were dismissed by a ruling of the FCA made prior to the full appeal hearing.

The second category can also be described as appeals that did not complete the full appeal process, and, therefore, were dismissed prematurely.

61.2% (n=338) of the Study Appeals completed the FCA appeal process through to a panel hearing and court decision. 38.8% (n=214) of the Study Appeals terminated prematurely. Of those, 21.2% (n=117) were voluntarily discontinued, and 17.6% (n=97) were dismissed by an FCA ruling.

Figure 2 compares how Study Appeals were terminated for the three different appellant types:

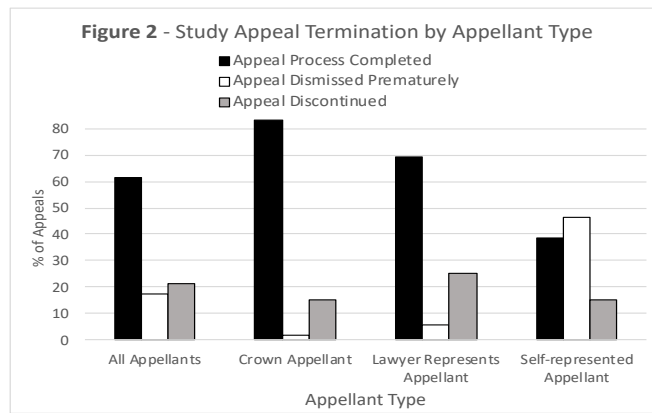


Figure 2 - Relationship between Study Appeal termination and representation type. “All Appellants” (N=552) includes appeals by the Crown (“Crown Appellant”, N=60), appeals conducted by non-Crown appellants represented by a lawyer (“Lawyer Represents Appellant”, N=323), and Self-represented Appellants (N=169). “Appeal Process Completed” are appeals that had a full panel hearing and were then granted or dismissed by a written decision. “Appeal Dismissed Prematurely” are appeals that were dismissed by an FCA ruling prior to a full panel hearing. “Appeal Discontinued” are proceedings voluntarily discontinued by the appellant.

The FCA prematurely terminated SRL appeals at a markedly higher rate (46.2%, n=78) than either lawyer representation group (Crown: 1.7%, n=1; non-Crown appellant: 5.6%, n=18). These different outcomes are statistically significant:  $\chi^2(4, N=552)=142.4, p<0.00001$ .

Table 3 evaluates whether the proportion of discontinued and premature dismissed Study Appeals is statistically related to the different appellant types and the three comparator appeal populations.

	Crown Appellant		Lawyer Represents Appellant		Self-represented Appellant		All Appellants	
	N	%	N	%	N	%	N	%
<b>Federal Court Trials</b>								
Completed	22	81.5%	113	63.8%	23	39%	158	60.1%
Incomplete Dismissed	1	3.7%	9	5.1%	34	57.6%	44	16.7%
Incomplete Discontinued	4	14.8%	55	31.1%	2	3.4%	61	23.2%
<b>Federal Court Judicial Reviews</b>								
Completed	10	71.4%	43	78.2%	18	62.1%	71	72.4%
Incomplete Dismissed	0	0%	3	5.5%	7	24.1%	10	10.2%
Incomplete Discontinued	4	28.6%	9	16.4%	4	13.8%	17	17.3%
<b>Tax Court of Canada Appeals</b>								
Completed	18	94.7%	67	73.6%	34	42.0%	119	62.3%
Incomplete Dismissed	0	0%	6	6.6%	27	33.3%	33	17.3%
Incomplete Discontinued	1	5.3%	18	19.8%	20	27.4%	39	20.4%
N	60		323		169		552	
$\chi^2$	4.7		7		19.9		5.3	
p-value	0.32		0.134		0.000517		0.253	
Appeal Type Significant?	N		N		Y		N	

Table 3 - Relationship between Study Appeal proceeding completion and appeal and representation type. “Completed” appeals are appeals that proceeded to a full panel hearing and court decision. “Incomplete Dismissed” are appeals that were dismissed by an FCA ruling prior to a full hearing. “Incomplete Discontinued” are proceedings voluntarily discontinued by the appellant. “ $\chi^2$ ” indicates the  $\chi^2$  statistic when comparing appeals by a given litigant type for the three comparator appeal groups. “p-value” indicates the probability that the outcome distribution is the result of random chance. “Appeal Type Significant” indicates whether the chi-square test p-value outcome was less than the 0.05 significance threshold.

Outcomes for different Study Appeal comparator groups are not significantly different for Crown appellants and non-Crown represented appellants. However, as with Table 2, comparator appeal group type is statistically linked to how SRL appeals terminate prematurely.



Figure 3 compares premature Study Appeal termination for lawyers and self-represented appellants conducting different comparator group appeals:

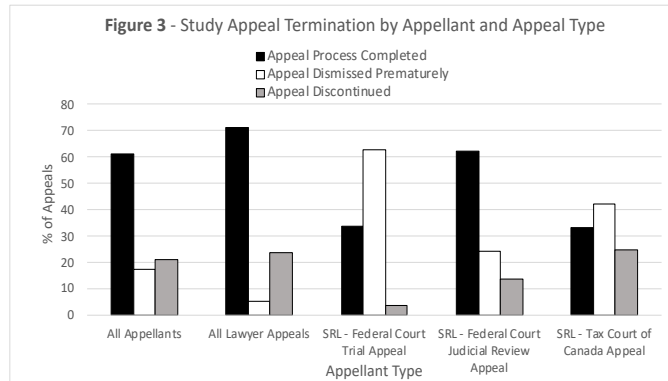


Figure 3 - Relationship between Study Appeal termination, representation type, and appeal type. “All Appellants” (N=552) includes appeals by the Crown, appeals conducted by non-Crown appellants represented by a lawyer, and self-represented appellants. “All Lawyer Appeals” includes all appeals conducted by the Crown or by an appellant represented by a lawyer (N=383). “SRL - Federal Court Trial Appeal” indicates appeals of FC trial proceedings conducted by a self-represented appellant (N=59). “SRL - Federal Court Judicial Review Appeal” indicates appeals of FC judicial reviews conducted by a self-represented appellant (N=29). “SRL - Tax Court of Canada Appeal” indicates appeals of TCC appeals conducted by a self-represented appellant (N=81). “Appeal Process Completed” are appeals that had a full panel hearing and were granted or dismissed by a written decision. “Appeal Dismissed Prematurely” are appeals that were dismissed by an FCA ruling prior to a full panel hearing. “Appeal Discontinued” are proceedings voluntarily discontinued by the appellant.

SRL comparator group appeals exhibit different and statistically relevant (Table 3) frequencies at which appeals reached a full hearing, were prematurely terminated by an FCA ruling, or were discontinued by the SRL.

Table 4 identifies the type and frequency of the reasons to prematurely dismiss SRL Study Appeals:

	Federal Court Trial Appeals		Federal Court Judicial Review Appeals		Tax Court of Canada Appeals		Total	
	N	%	N	%	N	%	N	%
Application to dismiss granted	1	3%	3	43%	3	9%	7	9%
Appeal was moot	0	0%	0	0%	1	3%	1	1%
Delay or inactivity	23	57%	4	57%	27	79%	54	69%
Legal representative required	1	3%	0	0%	3	9%	4	5%
No court jurisdiction	1	3%	0	0%	0	0%	1	1%
Stayed or terminated as SRL is vexatious	11	30%	0	0%	0	0%	11	14%
<b>Total</b>	<b>37</b>		<b>7</b>		<b>34</b>		<b>78</b>	

Table 4 - Frequency of different reasons for pre-hearing dismissal of SRL Study Appeals. Most SRL Study Appeals were dismissed pre-hearing because the SRL failed to advance the matter in a timely manner. The second most common reason for premature termination was the SRL was designated a vexatious litigant per *Federal Courts Rules* s 40,<sup>52</sup> and the appeal was stayed indefinitely, and, in certain instances, then struck out. Notably, all SRL Study Appeals that were terminated by *Federal Courts Rules* s 40 were SRL appeals of FC trial proceeding decisions.

<sup>52</sup> *Federal Courts Rules*, SOR/98-106, s 40 [FC Rules].

**C. Timing of Study Appeal Workflow**

Post-filing, Study Appeals took an average of 398 days (N=552) to reach a final conclusion with the Study Appeal either granted, dismissed, or discontinued.

Figure 4 illustrates the distribution of how much time was required to complete Study Appeal proceedings, separating Study Appeals that 1) were terminated prematurely, and 2) reached a full panel hearing that then resulted in a reported decision:

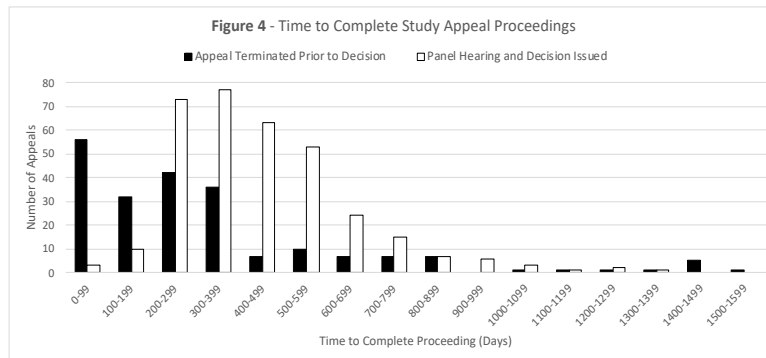


Figure 4 - Frequency of Study Appeal post-filing duration, comparing prematurely terminated Study Appeals (N=214) and Study Appeals that completed the full FCA appeal process (N=338).

Premature Study Appeal terminations decreased with time post-filing, while Study Appeals that completed the FCA process exhibit a normal distribution centered at around one-year post-filing.

Table 5 and Figures 5A and 5B show representation and comparator group appeal type had little effect on the duration of Appeal Group proceedings:

	N	Mean (Days)	Median (Days)	Standard Deviation
<b>Appeal Type</b>				
Federal Court Trials	263	441	345	290
Federal Court Judicial Reviews	98	363	353	215
Tax Court of Canada Appeals	191	397	373	234
<b>Litigant Type</b>				
Crown Appellant	60	412	379	215
Lawyer Represents Appellant	323	389	353	248
Self-Represented Appellant	169	405	346	292

Table 5 - Time to complete study appeals by litigant and appeal comparator group type. The Study Appeal appeal comparator group and litigant type categories include both appeals that resulted in a full hearing and written decision and Study Appeals that were terminated at an earlier point.

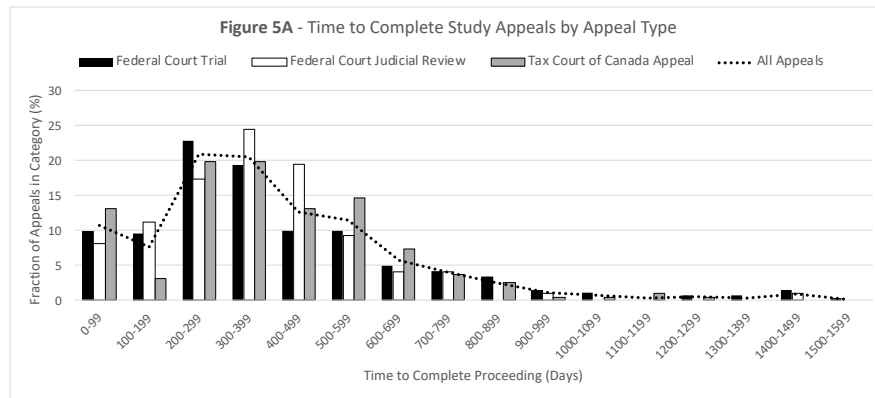


Figure 5A - Relationship between post-filing Study Appeal duration and comparator group litigation type. The Study Appeal type categories include both appeals that resulted in a full hearing and written decision and Study Appeals that were terminated at an earlier point. Federal Court Trials: N=263; Federal Court Judicial Reviews: N=98; Tax Court of Canada Appeals: N=191.

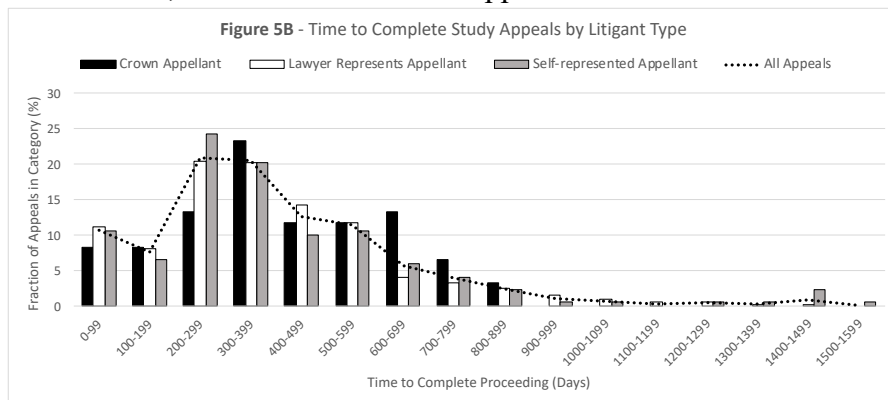


Figure 5B - Relationship between post-filing Study Appeal duration and representation type. The Study Appeal litigant type categories include both appeals that resulted in a full hearing and written decision and Study Appeals that were terminated at an earlier point. “Lawyer Represents Appellant” indicates Study Group appeals conducted by non-Crown appellants represented by a lawyer. Crown Appellant: N=60; Lawyer Represents Appellant: N=323; Self-represented Appellant: N=169.

This study evaluated the progress of Study Group Appeals through three time periods, the intervals between:

1. the appeal filing date, and completion of the appeal record by filing of the appeal book or final supplementary appeal book;
2. filing of the appeal book or final supplementary appeal book, and the full three-judge panel appeal hearing; and
3. the appeal hearing and issuing of a final judgment.

The mean duration of these three steps were 114 days (N=407), 258 days (N=338), and 75 days (N=338), respectively.

Figure 6 illustrates the frequency and distribution of the time required to complete the three FCA appeal process steps:

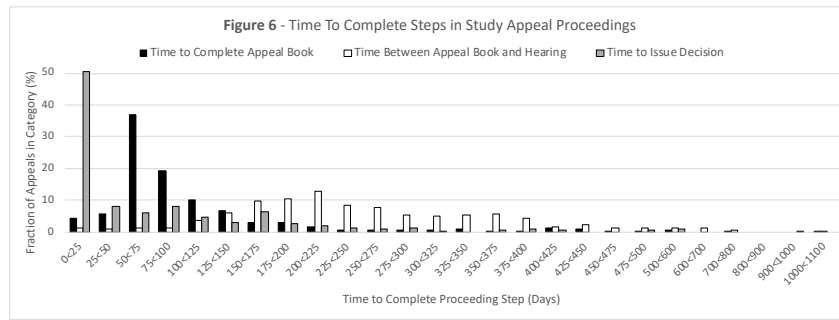


Figure 6 - Distribution and frequency of the time elapsed as Study Appeals completed three stages in the FCA litigation process. “Time to Complete Appeal Book” (N=407) is the number of days between when the appeal was filed, and the appeal book or final supplementary appeal book was filed. “Time Between Appeal Book and Hearing” (N=338) is the number of days between when the appeal book or final supplementary appeal book was filed, and the full appeal hearing. “Time to Issue Decision” (N=338) is the number of days between the full FCA appeal hearing and when the FCA issued a written decision. Note that the x-axis scale is not consistent.

The first two steps in the FCA appeal procedure, time to complete the appeal book, and then to proceed to a full hearing, exhibit a normal distribution. The time to issue a judgment distribution shows a logarithmic decay, with over half (54%, n=180) of all appeal decisions being issued in under a month. Figures 7, 8, and 9 compare the time required for Crown appeals, appeals by represented non-Crown appellants, and self-represented appellants to complete the three litigation process steps:

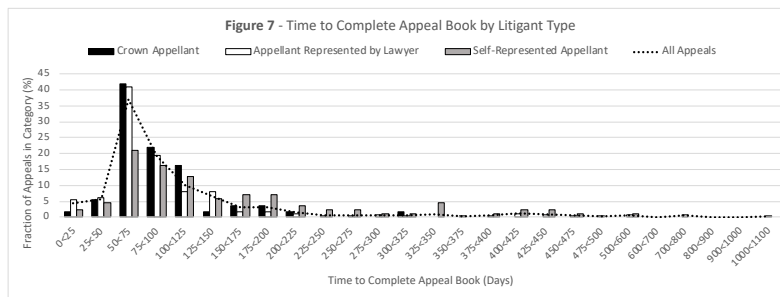


Figure 7 - Distribution and frequency of the time between Study Appeals filing of the appeal and filing the appeal book or final supplementary appeal book by litigant type. Note that the x-axis scale is not consistent. Crown Appellant: N=54; Appellant Represented by Lawyer: N=267; Self-represented Appellant: N=86.

The time required to complete the appeal book for Crown appellants ( $M=91, SD=50.9$ ) and non-Crown represented appellants ( $M=106, SD=117.1$ ) was not significantly different:  $t(319)=0.923, p=0.3567$ . However, SRLs ( $M=153, SD=155.2$ ) took significantly longer to complete and file their appeal books than either represented appellant type: Crown appellants:  $t(138)=2.838, p=0.0052$ ; non-Crown represented appellants:  $t(351)=2.976, p=0.0031$ .

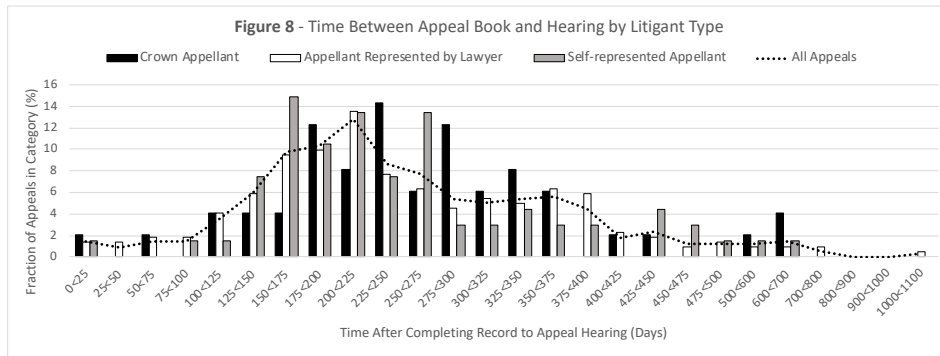


Figure 8 - Distribution and frequency of the time between Study Appeals filing the appeal book or final supplementary appeal book, and the full appeal panel hearing, by litigant type. Note that the x-axis scale is not consistent. Crown Appellant: N=50; Appellant Represented by Lawyer: N=222; Self-represented Appellant: N=67.

The range and frequency of time for the three litigant types to reach a full court hearing after the court record was completed was not statistically different:

- Crown appellant ( $M=272, SD=122$ ) vs non-Crown represented appellant ( $M=256, SD=133.8$ ):  $t(270)=-0.776, p=0.439$
- Crown appellant ( $M=272, SD=122$ ) vs self-represented appellant ( $M=254, SD=116.8$ ):  $t(115)=-0.81, p=0.42$
- Non-Crown represented appellant ( $M=256, SD=133.8$ ) vs self-represented appellant ( $M=254, SD=116.8$ ):  $t(287)=-0.11, p=0.912$ .

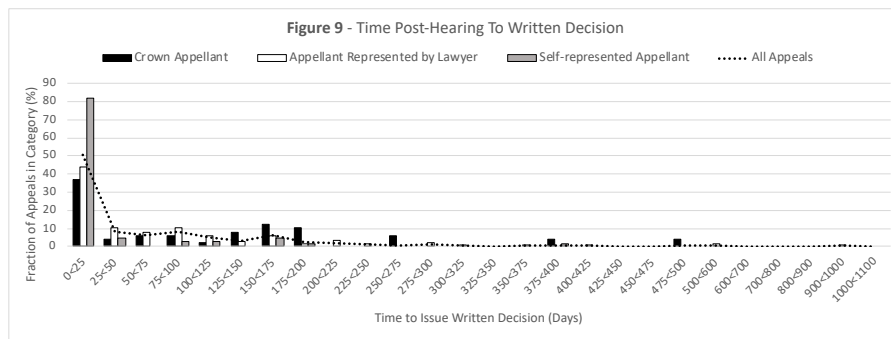
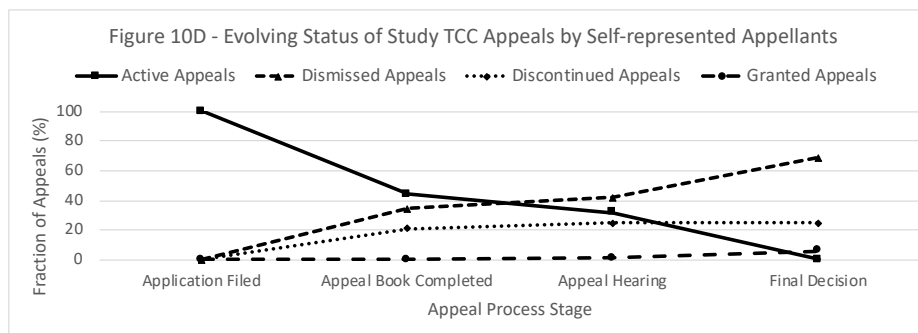
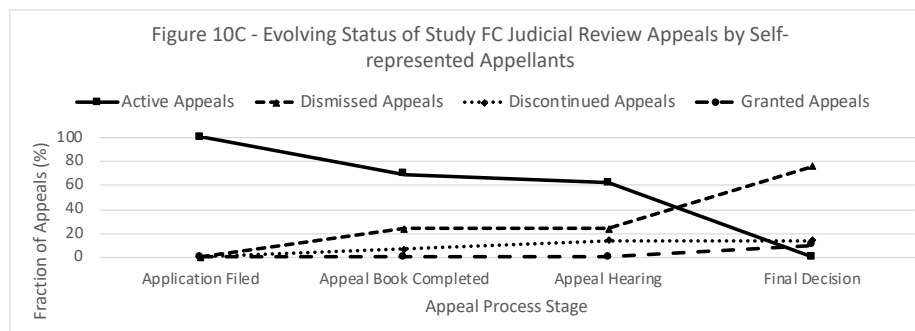
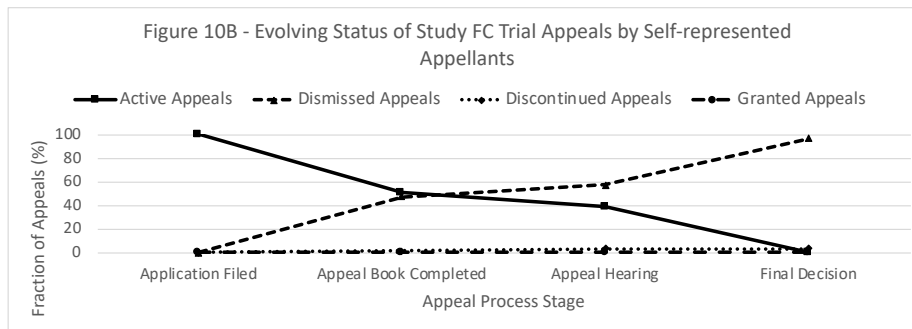
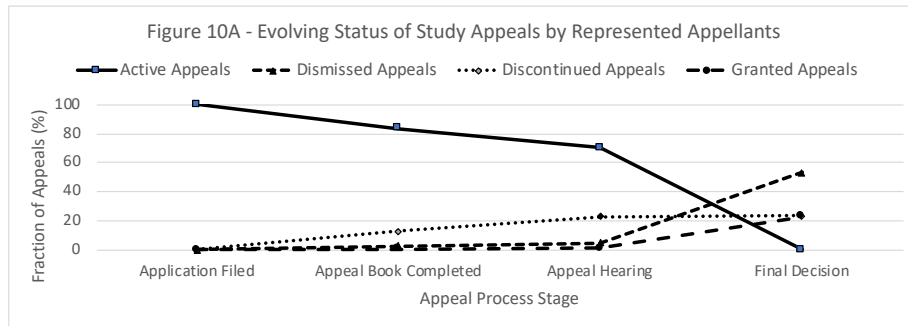


Figure 9 - Distribution and frequency of the time between Study Appeals full appeal panel hearing and FCA final written decision by litigant type. Note that the x-axis scale is not consistent. Crown Appellant: N=49; Lawyer Represented by Appellant: N=222; Self-represented Appellant: N=67.

The data pattern illustrated in Figure 9 is not suitable for a  $t$ -Test comparison, however the median time for the FCA to prepare written reasons for SRL appeals (3 days, N=67) is markedly shorter than for Crown appeals (82 days, N=49) and non-Crown appeals with lawyers (38 days, N=221).

**D. Evolution of Study Appeal Status and Outcomes**

A substantial proportion of Study Appeals did not lead to a full appeal proceeding: Figure 2, Table 3. The pattern of litigation outcomes for different self-represented appellant comparator group appeals is statistically different: Table 3. Figures 10A-D illustrate what fraction of Study Appeals terminated between the four FCA appeal workflow milestones:



Figures 10A-D - Frequency at which Study Appeals by represented appellants and SRLs in three comparator groups resolved between milestones in the FCA appeal process. For example, frequencies at the “Appeal Book Completed” x-axis location indicate the proportion of Study Appeals that resolved prior to a complete appeal book being filed, and the proportion of “Active Appeals” that reached the complete appeal book stage. Figure 10A: N=383; Figure 10B: N=59; Figure 10C: N=29; Figure 10D: N=81.

The progression tracked in Figures 10A-D can be described to define how the pool of 100% Study Appeals in an appeal comparator group stepwise converted from being active appeals, and were either discontinued, dismissed, or granted.

All three SRL comparator groups exhibited a similar pattern. Many SRL appeals either discontinued or were dismissed before an appeal book was completed. However, if an SRL appeal completed the appeal book stage, then that appeal in most cases proceeded to a full hearing and written decision. Represented appellants did not exhibit a similar dramatic decrease in active appeals prior to the appeal book step.

**E. Federal Court of Appeal Docket Record Activity**

The volume of litigation activity that resulted from Study Appeals was measured using: 1) the number of documents filed in the Study Appeal FCA docket, and 2) the number of “records” in the Study Appeal docket. While document volume is self-explanatory, “records” include filed documents, but also capture a broad range of activities by FCA Registry staff and decision-makers. For example, a docket “record” may document:

- letters, emails, faxes, telephone calls, and other communications being received or sent by the Registry,
- acknowledgments of receipt of court filings,
- receipt of incomplete or defective filings,
- rejection of documents,
- corrections and updates to documents,
- communications by the FCA to other courts,
- memos by Registry staff to track litigation events,
- referrals of litigation and other documents to Court justices,
- records of communications between the Registry and other FCA staff, and
- oral and written directions by the Court’s justices.

In short, the number of “records” in an FCA appeal docket is a way to evaluate the volume of FCA Registry activities, and case management steps by FCA justices.

On average, Study Appeal dockets include about twice as many records (50, N=552) as documents (27, N=552). Figure 11 illustrates the frequency of Study Appeal docket document and record volume:

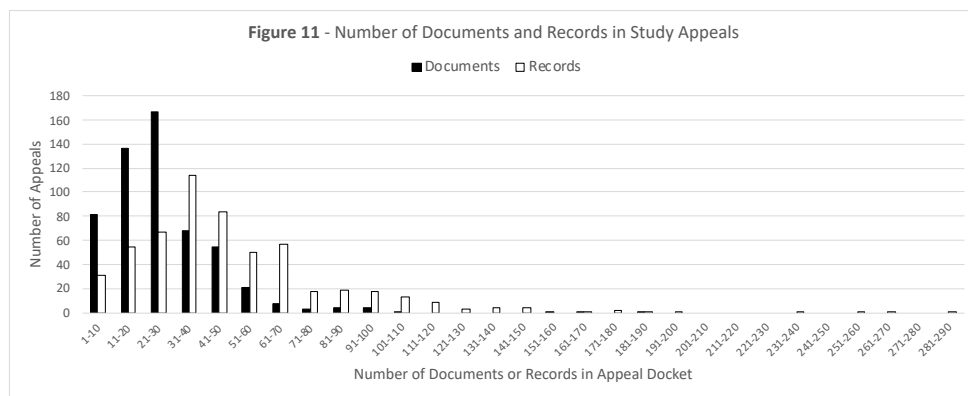


Figure 11 - Frequency and distribution of Study Appeal docket document and record volumes. N=552.

Both docket document and record volume exhibit a normal distribution. Table 6 shows docket document and record volume is not statistically different for Study Group appeals for Crown appellants, versus non-Crown represented appellants:

**Table 6 - *t*-Test Outcome Comparing Study Appeal Docket Document and Record Number for Represented Appellants**

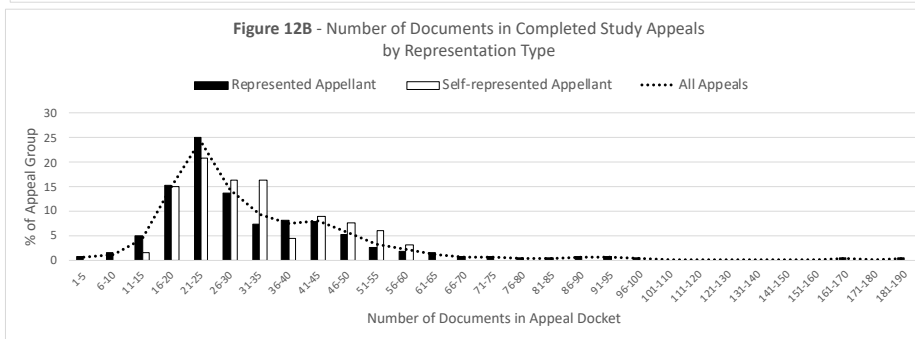
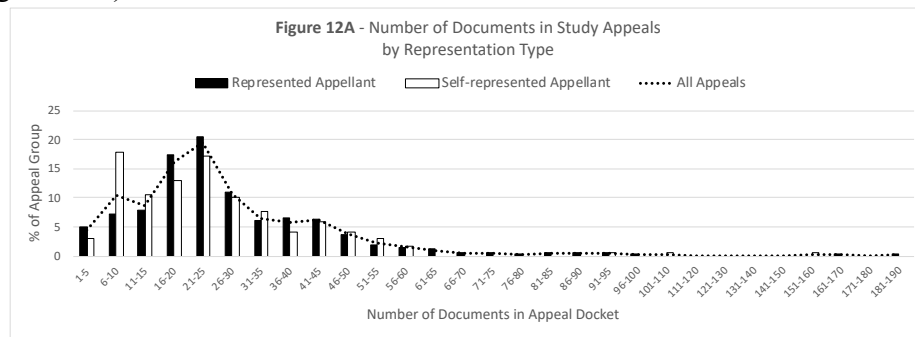
	N	Crown Appellants		Non-Crown Represented Appellants			Degrees of Freedom	<i>t</i> -Statistic	<i>p</i>
		Mean	Standard Deviation	N	Mean	Standard Deviation			
<b>Documents</b>									
All Appeals	60	27.4	17.3	323	28	19.9	381	0.219	0.827
Only Incomplete Appeals	11	12.8	6.78	101	17.2	13.2	110	1.09	0.28
Only Complete Appeals	49	30.7	17.3	222	32.9	20.4	269	0.701	0.484
<b>Records</b>									
All Appeals	60	48.5	31.5	323	47.6	33.1	381	-0.195	0.846
Only Incomplete Appeals	11	20.7	11.9	101	28.2	21.8	110	1.12	0.265
Only Complete Appeals	49	54.7	31.1	222	56.4	33.6	269	0.325	0.746

Table 6 - *t*-Test comparison of the number of documents and records in Study Appeals filed by Crown appellants and non-Crown represented appellants. “Incomplete Appeals” are Study Appeals that were terminated prior to a full panel court hearing. “Complete Appeals” are appeals that resulted in a panel court hearing and written decision. All *t*-Test results conclude that differences in the number of docket documents and records between Crown and non-Crown represented litigant actions are potentially the result of random chance ( $p > 0.05$ ).

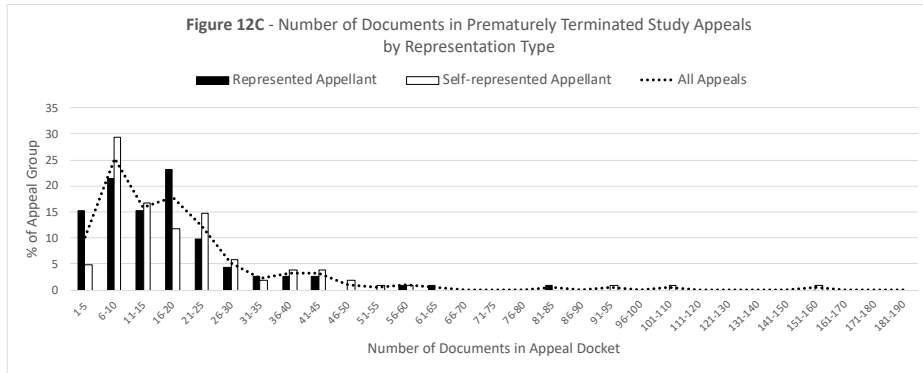
Given the Table 6 result, the Crown and non-Crown represented appellants populations were merged for the document and record volume analysis that follows.

### 1. Docket Documents

Figures 12A-C illustrate the relationship between representation type and Study Appeal docket document volume for all appeals (Figure 12A), appeals that ended with a full three-judge panel hearing and court decision (Figure 12B), and appeals that were dismissed or discontinued and therefore ended prematurely (Figure 12C):







Figures 12A-C - Frequency of number of documents in Study Appeal Dockets, separated by appellant type and proceeding outcome. Figure 12A: N=552; Figure 12B: N=338; Figure 12C: N=214.

Table 7 illustrates the number of Study Appeal docket documents is not statistically different for represented and self-represented appellants, except for Study Appeals that were prematurely terminated, where self-represented appellants had nearly double the number of documents:

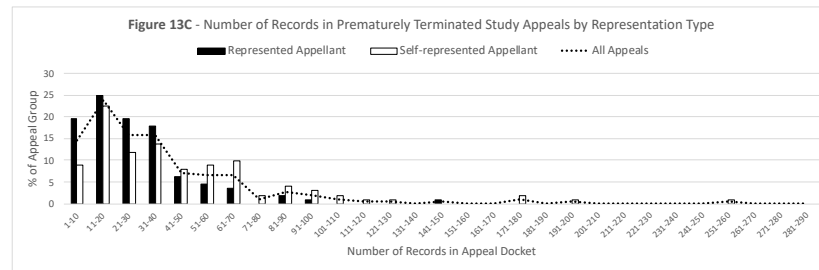
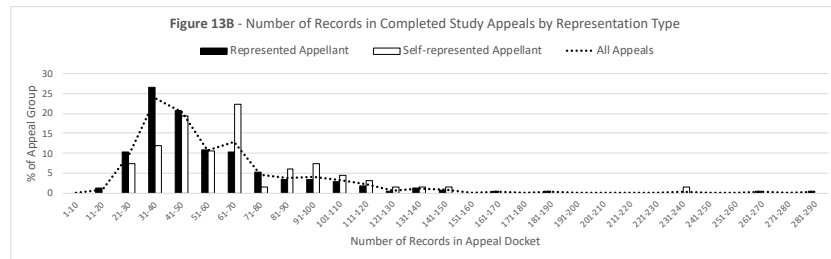
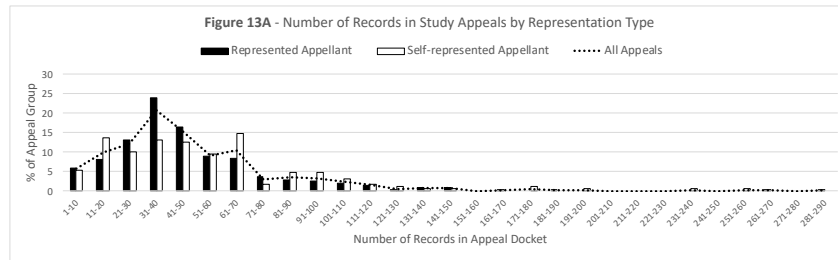
	N	Mean	Standard Deviation	Degrees of Freedom	t-statistic	p	Representation Type Significant?
All Appeals							
Represented Appellants	383	27.9	19.5	550	-1.651	0.104	N
Self-represented Appellants	169	25	18.7				
Only Complete Appeals							
Represented Appellants	271	32.5	19.9	336	-0.395	0.693	N
Self-represented Appellants	67	31.5	11.6				
Only Incomplete Appeals							
Represented Appellants	112	12.4	12.8	212	3.586	0.0004	Y
Self-represented Appellants	102	20.9	21.2				

Table 7 - t-Test analysis evaluating the statistical significance of differences between the number of documents in Study Appeals filed by represented and self-represented appellants, and separated by proceeding outcome. “Only Completed Appeals” are Study Appeals where a written decision was issued after a full panel hearing. “Only Incomplete Appeals” are Study Appeals that were terminated prior to a full panel hearing. “p” indicates the probability that the outcome distribution is the result of random chance. “Litigant Conduct Type Significant” indicates whether the t-test p-value outcome was less than the 0.05 significance threshold.

Figures 1-3 illustrate litigant-type specific patterns for Study Appeals that terminated prematurely. Represented appellants typically discontinue their actions, while self-represented appellants are much more likely to have their appeals dismissed pre-hearing. SRLs who voluntarily discontinued their appeal had an average of 13.1 (N=26) documents in the appeal docket. SRL appeals that were dismissed by the FCA pre-hearing had almost twice as many court documents (23.5, N=75).

## 2. Docket Records

Figures 13A-C illustrates the relationship between representation type and Study Appeal record document volume for all appeals (Figure 13A), appeals that ended with a full three-judge panel hearing and court decision (Figure 13B), and appeals that were dismissed or discontinued and therefore ended prematurely (Figure 13C):



Figures 13A-C - Frequency of number of records in Study Appeal Dockets, separated by appellant type and proceeding outcome. Figure 13A: N=552; Figure 13B: N=338; Figure 13C: N=214. Data in Figures 13A-C exhibit normal distributions.

In each of these three scenarios, the average number of records in SRL appeal dockets was larger than for appeals by represented appellants. Table 8 demonstrates that this pattern of SRL Study Appeal dockets having more records is statistically significant:

	N	Mean	Standard Deviation	Degrees of Freedom	t-statistic	p	Representation Type Significant?
<b>All Appeals</b>							
Represented Appellants	383	47.7	32.8	550	2.062	0.0397	Y
Self-represented Appellants	169	54.4	40.1				
<b>Only Complete Appeals</b>							
Represented Appellants	271	56.1	33.1	336	2.231	0.0263	Y
Self-represented Appellants	67	66.3	35.1				
<b>Only Incomplete Appeals</b>							
Represented Appellants	112	27.5	21.2	212	4.288	<0.0001	Y
Self-represented Appellants	102	46.5	41.3				

Table 8 - t-Test analysis evaluating the statistical significance of differences between the number of records in Study Appeals filed by represented and self-represented appellants, and separated by proceeding outcome. “Only Completed Appeals” are Study Appeals where a written decision was issued after a full panel hearing. “Only Incomplete Appeals” are Study Appeals that were terminated prior to a full panel hearing. “p” indicates the probability that the outcome distribution is the result of random chance. “Litigant Conduct Type Significant” indicates whether the t-test p-value outcome was less than the 0.05 significance threshold.

The greatest difference in docket record number was that self-represented appellants who did not complete their appeals had on average 70% more docket records than homologous appellants represented by lawyers.

Similar to docket document volume, SRLs who voluntarily discontinued their appeal had an average of 23.9 (N=26) docket records. SRL appeals that were dismissed by the FCA pre-hearing had almost twice as many court records (54.5, N=75). On average, the latter population had nearly as many records per docket (97.1%) as proceedings where the appellant was represented and the appeal completed the entire FCA appeal process.

### 3. Docket Record to Document Ratio – R

Another method to evaluate FCA litigation is to investigate how the number of documents in an individual docket relates to the number of records in that same docket. For this study that ratio is named “R”, and defined as:

$$R = \frac{\text{number of records in docket } X}{\text{number of documents in docket } X}$$

For example, the Badawy A-27-17 docket includes 30 documents and 82 records. R for Badawy A-27-17 is 82/30, or 2.73. R is always equal to or greater than 1, since any document in a docket is also a docket record.

Study Appeal R values range from 1.2 to 8.75, with a mean of 1.92 and a median of 1.74 (N=552). Figure 14 illustrates that Study Appeal R exhibits a normal distribution:

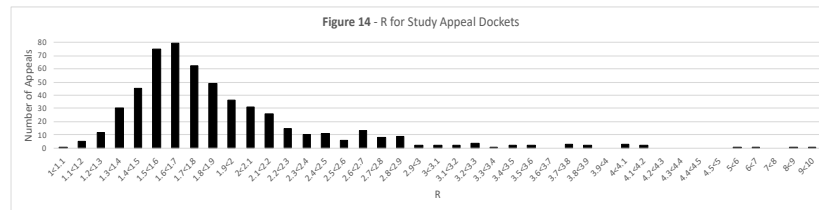


Figure 14 - Frequency of R (docket records to docket document) scores for Study Appeals. Note that the x-axis scale is not consistent.

Figure 15 shows the ratio of docket documents to records remains largely constant from both simple to very complex appeal proceedings, with the majority of Study Appeals clustering in a linear relationship:

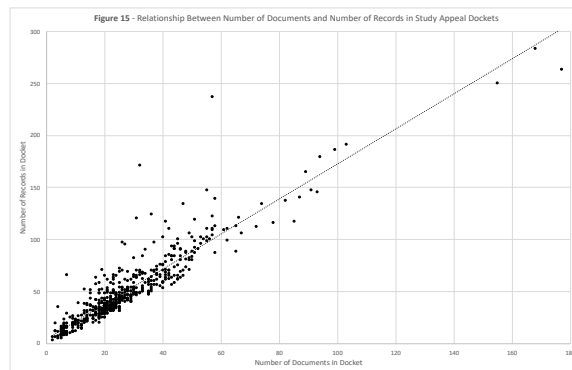


Figure 15 - Scattergram plot of individual Study Appeal docket document and record volume. Each point is a single Study Appeal. The line is a linear regression plot for all Study Appeals:  $y = 1.69x + 4.15$ . N=552.

FCA Study Appeal docket activity clusters around a ratio of 1.69 records per document, plus 4.15 additional records per docket. Notably, when a Study Appeal diverges from this relationship, that difference is usually “above” the Figure 15 linear regression plot. That means that Study Appeals that have atypical R values are dockets where record volume is unusually large.

The next step in investigating Study Appeal docket activity is to examine whether R is affected by appeal and/or appellant type.

**a. R Relationship to Appeal Type**

The mean R value for the three Study Appeal comparator groups is similar:

- FC trial appeals: R=1.92 (N=263, SD=0.75)
- FC judicial review appeals: R=1.82 (N=98, SD=0.49)
- TCC appeals: R=1.96 (N=191, SD=0.74).

Figure 16 illustrates that R follows a similar distribution for all three comparator appeal type groups:

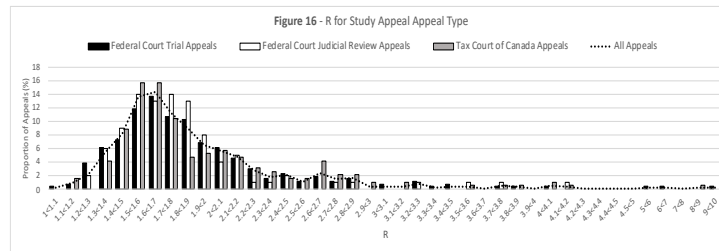


Figure 16 - Frequency of R docket document to record values for the three Study Appeal comparator appeal groups. Note that the x-axis scale is not consistent. Federal Court Trial Appeals: N=263; Federal Court Judicial Review Appeals: N=98; Tax Court of Canada Appeals: N=191.

Figure 17 illustrates the different appeal comparator types cluster in a similar manner to the overall linear relationship identified in Figure 15:

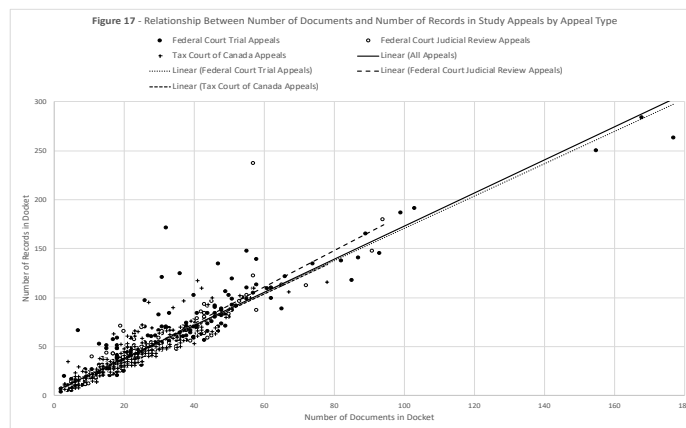


Figure 17 - Scattergram plot of individual Study Appeal docket document and record volume, by comparator appeal type group. Each point is a single Study Appeal. Federal Court Trial Appeals: N=263; Federal Court Judicial Review Appeals: N=98; Tax Court of Canada Appeals: N=191. Lines are linear regression plots: “All Appeals”:  $y=1.69x+4.15$ ; “Federal Court Trial Appeals”:  $y=1.65x+5.65$ ; “Federal Court Judicial Review Appeals”:  $y=1.87x+1.09$ ; “Tax Court of Canada Appeals”:  $y=1.66x+4.09$ . Note

that the linear regression plots for “All Appeals”, “Federal Court Trial Appeals”, and “Tax Court of Canada Appeals” are nearly identical and partially overlap.

Figure 17 shows that none of the three comparator appeal type groups dominates the atypical R Study Appeals located above the linear regression plot.

The normal R value distributions of the three Study Appeal comparator groups are not statistically different:

- FC trial appeals and FC judicial review appeals:  $t(359)=-1.23, p=0.221$
- FC trial appeals and TCC appeals:  $t(452)=0.564, p=0.573$
- FC judicial review appeals and TCC appeals:  $t(287)=1.69, p=0.0918$ .

These results all indicate the ratio of documents and records in Study Group dockets is unrelated to comparator appeal group type.

**b. R Relationship to Appellant Type**

The mean R value for SRLs is substantially larger than either of the two represented litigant types:

- Crown appeals:  $R=1.83 (N=60, SD=0.5)$
- non-Crown represented litigant appeals:  $R=1.71 (N=323, SD=0.43)$
- self-represented appellant appeals:  $R=2.28 (N=168, SD=1.01)$

Put another way, Study Appeals initiated by self-represented appellants had 24.6% more FCA Registry activity than Crown appeals, and 33.3% more FCA Registry activity than non-Crown represented appellants.

This difference is evident in Figure 18 that depicts the R distribution patterns for all three Study Group litigant types:

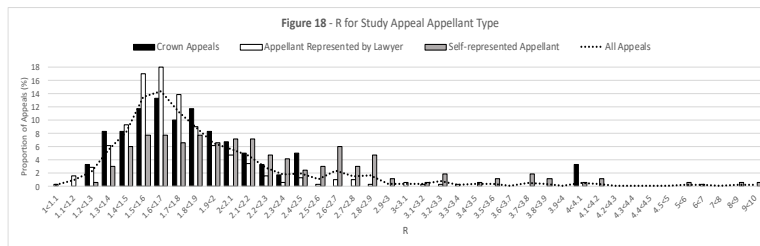


Figure 18 - Frequency of R docket record to document record scores for the three Study Appeal appellant types. Crown Appeals:  $N=60$ ; Appellant Represented by Lawyer:  $N=323$ ; Self-represented Appellant:  $N=168$ .

Few self-represented appellant appeals had lower R values, and the normal SRL distribution of R values is broader and shallower than that of the two represented litigant types. The differences between SRL and represented litigant R values shows high statistical significance:

- Crown appellants and non-Crown represented appellants:  $t(381)=-1.93, p=0.54$
- Crown appellants and self-represented appellants:  $t(226)=3.31, p=0.0011$
- non-Crown represented appellants and self-represented appellants:  $t(489)=-8.74, p<0.0001$ .

Figure 19 is a scattergram that plots all Study Appeals, distinguishing the three appellant types:

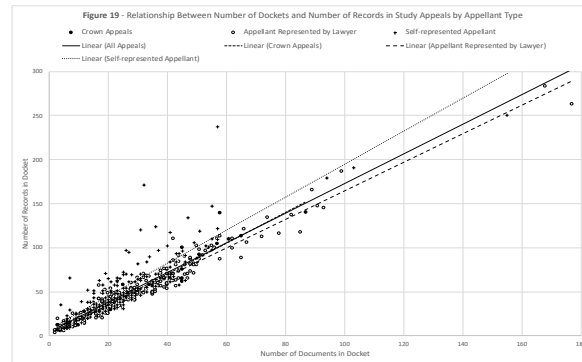


Figure 19 - Scattergram plot of individual Study Appeal docket document and record volume, by appellant type. Each point is a single Study Appeal. Crown Appeals: N=60; Appellant Represented by Lawyer: N=323; Self-represented Appellant: N=169. Lines are linear regression plots: “All Appeals”:  $y=1.69x+4.15$ , N=552; “Crown Appeals”:  $y=1.75x+0.3$ ; “Represented Appellants”:  $y=1.62x+2.21$ ; “Self-represented Appellant”:  $y=1.87x+7.41$ . Note that the linear regression plots for “All Appeals” and “Crown Appeals” are nearly identical and partially overlap.

The Figure 19 linear regression plot for SRLs is higher than for other appellant types, reflecting the typically larger R values for litigation by that appellant type. A large majority of the atypical high R-value appeals located above the main diagonal grouping are appeals by self-represented appellants. That observation indicates that not only do SRL matters as a whole involve more Registry activities, but Study Appeals that exhibit disproportionately high Registry activity are almost always appeals by self-represented appellants.

#### 4. Relationship Between Appeal Duration and Document and Record Number

Table 5 shows that Study Appeal comparator group and appellant type had little effect on the average time for FCA appeals to reach a final outcome. The variation in appeal proceeding duration is broad (Figure 4), and that distribution is not affected by Study Appeal comparator group (Figure 5A) or appellant type (Figure 5B). Similarly, Study Appeal docket document and record number exhibits a wide range (Figure 11).

Combining this data allows a calculation on the “pace” of litigation: the average number of days that passed between documents and records being added to a docket. These two values are:

$$T_D = [\text{days to complete the Study Appeal X}] / [\text{number of documents in the Study Appeal X docket}]$$

$$T_R = [\text{days to complete the Study Appeal X}] / [\text{number of records in the Study Appeal X docket}]$$

$T_D$  and  $T_R$  scores are only a very general indication of the “pace” of the litigation, since most FCA dockets show bursts of activity, rather than a regular metronomic step-by-step advance of new docket documents and records. Nevertheless,  $T_D$  and  $T_R$  might provide some insight on whether longer or short duration Study Appeals are linked to different volumes of litigation and/or Registry activity.

Study Group Crown appeals and non-Crown appeals by represented litigants were grouped for the  $T_D$  and  $T_R$  analysis that follows. These two Study Appeal appellant types do not exhibit statistically different appeal durations, docket document volume, or docket record volume.

Study Appeal  $T_D$  ranged from 0.4 to 184.7 days per docket document, with a mean of 18.3 days per document. Figure 20 depicts the distribution and frequency of  $T_D$  for all Study Appeals, represented appellant appeals, and self-represented appellant appeals:

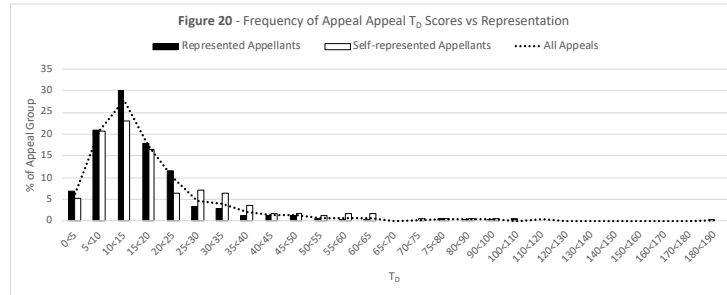


Figure 20 - Frequency of  $T_D$  (days per docket document) for all Study Appeals ( $N=552$ ), Study Appeals where the appellant was represented ( $N=383$ ), and Study Appeals initiated by self-represented appellants ( $N=169$ ). Note that the x-axis scale is not consistent.

The average represented appellant Study Appeal  $T_D$  was lower (mean  $T_D=17.2$ ,  $N=383$ ,  $SD=16.3$ ) than for self-represented appellant Study Appeals (mean  $T_D=20.7$ ,  $N=169$ ,  $SD=16.5$ ). This difference is statistically significant:  $t(550)=2.32$ ,  $p=0.021$ .

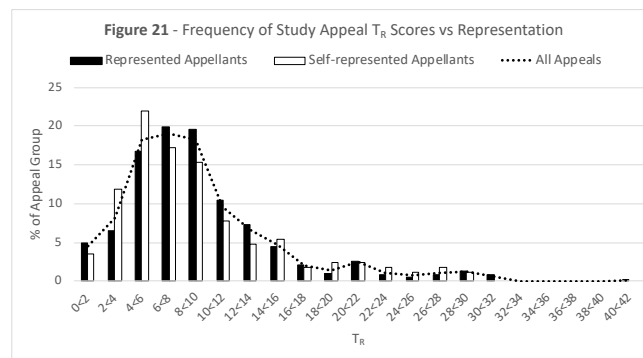


Figure 21 - Frequency of  $T_R$  (days per docket record) for all Study Appeals ( $N=552$ ), Study Appeals where the appellant was represented ( $N=383$ ), and Study Appeals initiated by self-represented appellants ( $N=169$ ).

The average  $T_R$  for represented litigant Study Appeals (mean  $T_R=9.36$ ,  $N=383$ ,  $SD=5.88$ ) and self-represented Study Appeals (mean  $T_R=9.11$ ,  $N=169$ ,  $SD=6.12$ ) are practically identical, and the distribution of  $T_R$  for these two appellant representation types is not statistically significant:  $t(550)=-0.455$ ,  $p=0.65$ .

Figure 22 is a scattergram plot of  $T_D$  and  $T_R$  data:

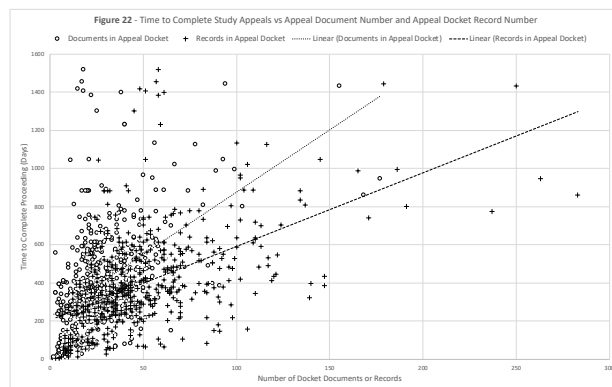


Figure 22 - Scattergram plot of individual Study Appeal docket document and record volume, against the time to complete the Study Appeal. N=552. Each point is a single Study Appeal. Lines are linear regression plots: “Documents in Appeal Docket”:  $y=6.5363x+221.36$ ; “Records in Appeal Docket”:  $y=3.8555x+206.28$ .

Unlike R, where the relationship between docket document and docket number is relatively consistent (Figure 15), individual Study Appeal  $T_D$  and  $T_R$  ratios are widely dispersed. This indicates that document and record volume, and appeal duration, are only weakly associated.

$T_D$  of SRL and represented appellants was significantly different. Figure 23 compares  $T_D$  for these two appellant types:

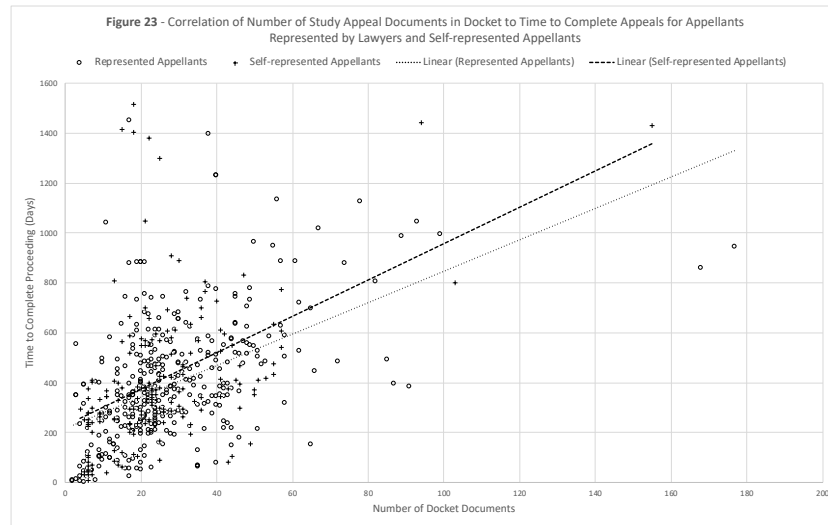


Figure 23 - Scattergram plot of individual Study Appeal docket document volume against the time to complete the Study Appeal, for represented and self-represented appellants. Each point is a single Study Appeal. Lines are linear regression plots: “Represented Appellants”:  $y=6.3048x+216.64$ . N=383; “Self-represented Appellants”:  $y=7.3099x+227.3$ .

$T_D$  datapoints for SRLs and represented litigants again do not cluster. Representation type and the “pace” of litigation are only weakly linked, though on average  $T_D$  for these two populations was statistically different.

No further investigation of  $T_D$  and  $T_R$  was conducted since these variables show little linkage to this study’s primary research objectives.

## F. Study Appeals Initiated by SRLs with Known Problematic Litigation Histories

This study investigated the litigation backgrounds of the self-represented appellants who initiated the Study Appeals as described in Part II(C). The result was that:

- 10.6% (n=17) of the Study self-represented appellants were identified as subject to court access restrictions imposed by one or more courts or tribunals,
- 33.7% (n=54) of the Study self-represented appellants were identified as the subject of one or more court findings that concluded the SRL engaged in abusive litigation conduct, but that SRL was not identified as subject to court access restrictions, and
- 55.6% (n=89) of the study self-represented appellants were neither identified as being subject to court access restrictions, nor findings that the SRL had engaged in abusive litigation conduct.



For the purposes of this paper, these three categories are identified as “Known Vexatious SRLs”, “Known Abusive SRLs”, and “No Known Problematic Litigation SRLs”, respectively. Known Vexatious SRLs and Known Abusive SRLs together are “Problematic Litigation SRLs”.

Known Vexatious SRLs were much more active in 2016 and 2017 than the other SRL conduct types. On average each Known Vexatious Litigant filed 1.94 FCA appeals in those years, twice the rate for Known Abusive Litigants (1.04 appeals) and No Known Problematic Litigation SRLs (1.03 appeals).

### 1. Problematic Litigation SRLs and Appeal Comparator Group Type

Figure 24 shows the frequency at which the three SRL litigation conduct types initiated SRL Study Appeals:

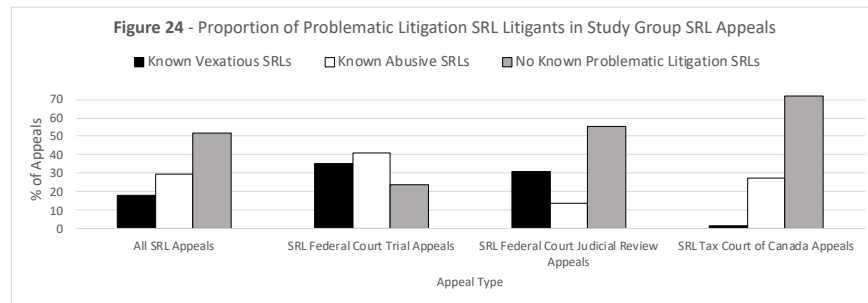


Figure 24 - Proportion of SRL appellant conduct types in all SRL study appeals, and SRL appeals belonging to each of the three comparator groups. All SRL Appeals: N=169; SRL Federal Court Trial Appeals: N=59; SRL Federal Court Judicial Review Appeals: N=29; SRL Tax Court of Canada Appeals: N=81.

The proportion of Problematic Litigation SRL appeals from the FC is larger than for self-represented appellants challenging decisions of the TCC. This difference is particularly evident in the frequency of appeals by Known Vexatious SRLs. These appeals made up 35.6% (n=21) and 31% (n=9) of the FC trial and judicial review SRL appeals. There was only one Known Vexatious Litigant TCC appeal. These differences are statistically significant and highly unlikely to be the result of random chance:  $\chi^2(4, N=169)=45.2, p<0.00001$ .

### 2. Outcomes of Problematic SRL Study Appeals

Figure 25 compares how Study Appeal outcome is related to SRL representation and litigation conduct type:

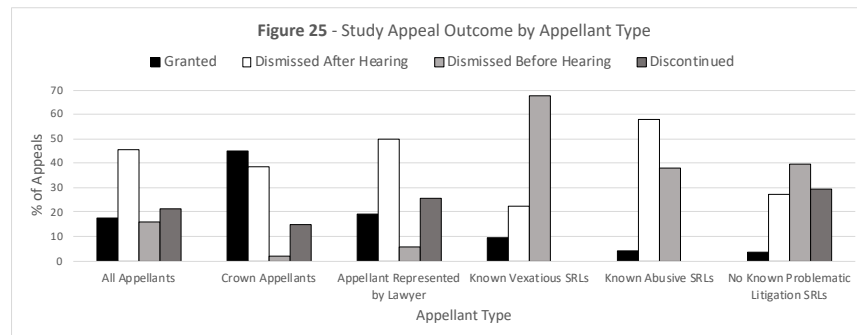


Figure 25 - Relationship between Study Appeal outcomes and appellant representation and SRL litigation conduct type. “Granted” are appeals that were granted in whole or in part. “Dismissed After Hearing” are appeals that were dismissed by a written decision following a full panel hearing. “Dismissed

Before Hearing” are appeals that were dismissed by a FCA ruling prior to a full panel hearing. “Appeal Discontinued” are proceedings voluntarily discontinued by the appellant. “Appellant Represented by Lawyer” are non-Crown Study Appeals where the appellant is represented. All Appellants: N=552; Crown Appellants: N=60; Appellant Represented by Lawyer: N=323; Known Vexatious SRLs: N=31; Known Abusive SRLs: N=50, No Known Problematic Litigation SRLs: N=88.

The three self-represented appellant litigation conduct types exhibit markedly different litigation outcome profiles both from each other and that of represented appellants. Interestingly, of the three SRL litigation type groups, Known Vexatious SRLs had the highest rate of some kind of success in their FCA appeals (9.7%, n=3), but Known Abusive SRLs were twice as likely to complete their appeal proceedings (62%, n=31) than Known Vexatious SRLs (32.3%, n=10), and No Known Problematic Litigation SRLs (30.7%, n=27). Problematic Litigation SRLs never voluntarily discontinued their appeals. 29.6% (n=26) of No Known Problematic Litigation SRLs voluntarily terminated their litigation. The differences between appeal outcome frequency for the three SRL litigation conduct types is statistically significant:  $\chi^2(6, N=169)=40.9, p<0.00001$ .

Known Vexatious SRL appeals that terminated pre-hearing were predominately (72.2%, n=18) terminated by active court litigation management steps (e.g. dismissed after application, stayed or terminated as vexatious, terminated for failure to pay security for costs), rather than being dismissed for delay. However, active litigation management terminated only 21.1% (n=19) and 17.1% (n=35) of Known Abusive SRL and No Known Problematic Litigation SRL appeals that ended prematurely prior to a full court hearing.

### 3. Problematic SRL Appeal Timing

On average, Known Vexatious SRL Study Appeals required substantially more time to reach a final outcome (633 days, N=31, SD=441.4) than appeals conducted by Known Abusive SRLs (389 days, N=50, SD=209) and No Known Problematic Litigation SRLs (339 days, N=88, SD=218.1). This difference is statistically significant:

- Known Vexatious SRLs vs Known Abusive SRLs:  $t(79)=-3.379, p=0.0012$ .
- Known Vexatious SRLs vs No Known Problematic Litigation SRLs:  $t(117)=-4.819, p<0.001$
- Known Abusive SRLs vs No Known Problematic Litigation SRLs:  $t(136)=-1.314, p=0.191$ .

Table 9 reports the time required for SRL appeals to move through the FCA appeal process:

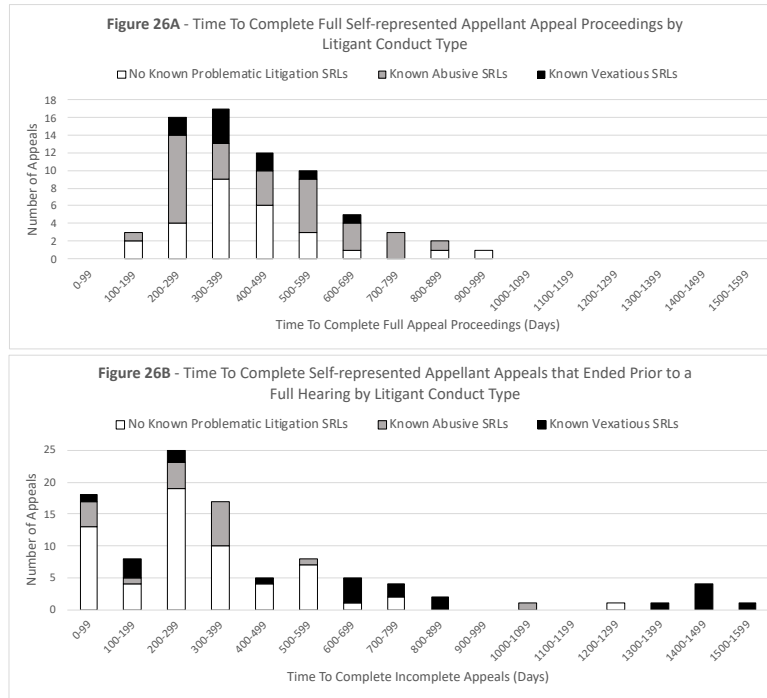
**Table 9 - Time to Complete Study Appeal Litigation Steps by Different SRL Appellant Types**

Self-represented Appellant Type	Time to Complete Appeal Book			Time Between Appeal Book and Hearing			Time Post-Hearing to Written Decision	
	N	Mean (Days)	Standard Deviation	N	Mean (Days)	Standard Deviation	N	Mean (Days)
All Self-represented Appellants	86	153	155.2	67	254	116.8	67	27
Known Vexatious SRLs	13	95	46.4	10	279	101.1	10	7
Known Abusive SRLs	34	167	124.3	31	261	116.2	31	27
No Known Problematic Litigation SRLs	39	160	117.1	26	248	121.9	26	35

Table 9 - Time for different SRL conduct types to complete the three stages in the FCA appeal process. “N” indicates the number of SRLs who completed a given step. No standard deviation is listed for the “Time Post-Hearing to Written Decision” stage since the time frequency distribution for that step does not exhibit a normal distribution: Figure 9.

Known Vexatious SRLs completed the appeal book stage significantly faster than Known Abusive SRLs:  $t(45)=2.024, p<0.049$ .

As illustrated by Figure 4, Study Appeals that were terminated prematurely, and appeals that resulted in a full panel hearing and decision have markedly different patterns in the time required to complete the appeal. Figures 26A and 26B compare the frequency of time required to complete SRL Study Appeals filed by the different self-represented appellant conduct types:



Figures 26A and 26B - Distribution and frequency of times to complete self-represented appellant FCA appeals where the self-represented appellant completed the appeal process (Figure 26A), or the appeal ended prematurely (Figure 26B), distinguishing between by self-represented appellant conduct type. Figure 26A: N=69; Figure 26B: N=100.

Figure 26A shows SRL appellant type has little relationship to the time required to complete a full FCA proceeding. Known Vexatious and Known Abusive SRLs exhibit much the same distribution as No Known Problematic Litigation SRLs. Figure 26B shows that the time to complete prematurely terminated SRL Study Appeals exhibits a very different profile. Known Vexatious SRLs dominate the longer-duration appeals.

This pattern is also reflected in the average period to terminate appeals, as shown in Table 10:

	N	Mean	Standard Deviation	Degrees of Freedom	t-statistic	p	Litigant Conduct Type Significant?
<b>Appeals That Completed the FCA Process</b>							
No Known Problematic Litigation SRLs	31	441	180.7	39	-0.752	0.457	N
Known Vexatious SRLs	10	395	117.4	34	-0.574	0.57	N
Known Abusive SRLs	26	428	166				
<b>Appeals That Never Completed Appeal Book</b>							
No Known Problematic Litigation SRLs	49	258	180.8	65	-5.755	<0.0001	Y
Known Vexatious SRLs	18	699	450.8	32	-3.776	0.0007	Y
Known Abusive SRLs	16	256	135.5				

Table 10 - *t*-Test analysis evaluating whether the time to complete self-represented appellant study appeals that either completed the FCA appeal process, or that terminated without filing an appeal book, are significantly different between Known Vexatious SRLs, versus Known Abusive SRLs and No Known Problematic Litigation SRLs. “*p*” indicates the probability that the outcome distribution is the result of random chance. “Litigant Conduct Type Significant” indicates whether the *t*-test *p*-value outcome was less than the 0.05 significance threshold.

The average time for a Known Vexatious SRL Study Appeal to complete the FCA process and end in a written panel decision was actually less than other self-represented appellant litigation conduct groups, but not significantly so. In contrast, for SRL appeals that terminated early without completing the appeal book milestone, Known Vexatious SRL appeals took over twice as long to complete than other SRL litigation conduct types, a statistically significant difference.

**4. Problematic SRL Appeal Docket Activity**

Self-represented appellants had significantly more records per Study Appeal docket than represented appellants: Table 8. On average, SRL study appeal R values are higher than R when an appellant was represented: Part III(E)(3)(b).

Table 11 compares average docket document and record volume, and R, for the three SRL conduct types in completed and prematurely terminated appeals.

**Table 11 - Study Appeal Docket Document and Record Volume, R, and Appellant Type**

	Documents		Records		R	
	Completed Appeal	Appeal Terminated Prior to Hearing	Completed Appeal	Appeal Terminated Prior to Hearing	Completed Appeal	Appeal Terminated Prior to Hearing
<b>Self-represented Appellants</b>						
Known Vexatious SRLs	38.2	41.1	89.2	88.7	2.43	2.43
Known Abusive SRLs	30.9	17.7	66.5	39.2	2.07	2.27
No Known Problematic Litigation SRLs	29.4	15	57.3	34.5	2.01	2.43
<b>Appellant Represented by Lawyer</b>	32.5	12.4	56.1	27.5	1.77	1.72

Table 11 - Average number of documents, records, and R for the three self-represented appellant conduct types and represented appellants. “Completed Appeal” are FCA Study proceedings that concluded with a written decision following a full hearing. “Appeal Terminated Prior to Hearing” are FCA study proceedings where the Study Appeal was discontinued or dismissed prior to a full hearing. Known Vexatious SRLs: Completed Appeal, N=10, Appeal Terminated Prior to Hearing, N=21; Known Abusive SRLs: Completed Appeal, N=31, Appeal Terminated Prior to Hearing, N=19; No Known Problematic Litigation SRLs: Completed Appeal, N=26, Appeal Terminated Prior to Hearing, N=62; Appellant Represented by Lawyer: Completed Appeal, N=271, Appeal Terminated Prior to Hearing, N=112.

The average volume of documents for Known Abusive and No Known Problematic Litigation SRLs is similar to, or even less, than for Study Appeals conducted by lawyers. Known Vexatious SRL Study Appeals have substantially larger document volumes. The same pattern largely repeats for docket record volume, except that all three SRL litigation conduct types had more records per docket.

Interestingly, for Known Vexatious SRLs, it made no difference whether their Study Appeals completed the appeal process, or were terminated prior to that. Known Vexatious SRL document and record volume is the same, no matter whether those matters were struck out, abandoned, or otherwise terminated early. This observation indicates that the Registry and Court workload resulting from Known Vexatious SRL activity is unaffected by litigation management steps.

All SRL litigation conduct types had higher average R values than for Study Appeals conducted by lawyers. This difference was particularly pronounced: 1) for Known Vexatious SRLs, and 2) where an SRL appeal terminated prematurely.

## 5. Interlocutory FC Appeals

FCA docket records identify some appeals as interlocutory appeals of an FC decision, rather than an appeal of a final FC trial or judicial review outcome. Figure 27 illustrates that the ratio of final to interlocutory FC appeals was closest for Known Vexatious SRLs:

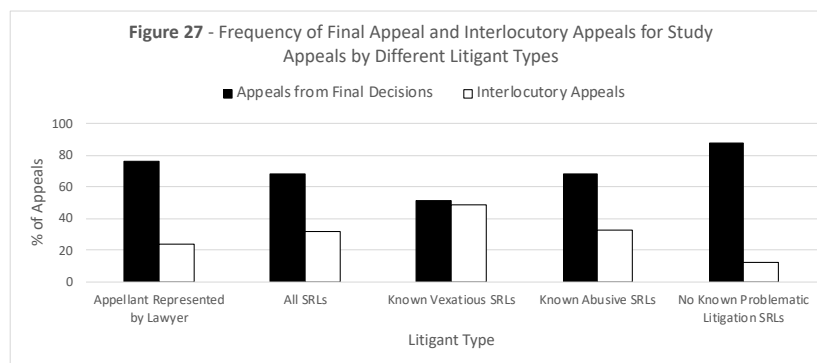


Figure 27 - Frequency of appeals of FC final and interlocutory decisions for different Study appellant types. Appellant Represented by Lawyer: N=274; All SRLs: N=88; Known Vexatious SRLs: N=29; Known Abusive SRLs: N=28; No Known Problematic Litigation SRLs: N=40.

The higher frequency at which Known Vexatious SRLs conduct interlocutory appeals versus other SRL types is statistically significant:  $\chi^2(3, N=95)=9.89, p=0.0071$ .

## IV. DISCUSSION AND ANALYSIS

To the best of the authors' knowledge, this study is the first statistically valid "side-by-side" population comparison of represented litigant and SRL proceedings. As a preliminary point, the authors stress this investigation was neither difficult, costly, nor disproportionately time consuming. Most study information was collected from online court web forms and reported decisions using the CanLII database.<sup>53</sup> The methodology and analytical tools used are standard for scientific, medical, and social sciences investigation of population characteristics. Data collection and analysis was completed in 2.5 months by two lawyers with unrelated full-time day jobs engaging in hobbyist academic investigation during weekday evenings and weekends. There was no financial expense to conduct this study.

Given this inter-population comparison is novel, the authors have collected and evaluated a broad range of litigation and litigant metrics. Ideally, this broad-based investigation and report will provide a useful comparator population for future studies.

Data collection and analysis centred on two foci:

1. Comparison of FCA appeals conducted by self-represented appellants and appellants with lawyers:
  - a. How are self-represented and represented appellant litigation outcomes at the FCA similar or different?
  - b. Does the manner in which self-represented and represented appellants resolve their FCA appeals differ?

<sup>53</sup> Online: *CanLII* <[www.canlii.org/](http://www.canlii.org/)> [perma.cc/5TRW-6FG2].

- c. Is the time to advance through and complete FCA proceedings different for self-represented and represented appellants?
- d. Does the FCA litigation conducted by self-represented and represented appellants involve more or fewer litigation steps, procedures, and interactions with the FCA Registry?
2. What are the characteristics of problematic litigation record SRLs in FCA proceedings, and how do those problematic litigation record SRLs compare to the broader SRL population?
3. This project is an “appellant-focused study”, and does not evaluate the potential impact of whether the respondent is represented or not. This limitation is a consequence of how FCA online dockets identify respondents. The FCA docket “Additional information” “Solicitor” columns are not populated for non-appellants. That meant the type of respondents in play could not be determined for certain appeals.

### A. Appeal Outcomes

Appellant type is a strong predictor of FCA appeal outcome: Figure 1. The frequency at which Crown appeals and appeals by non-Crown represented appellants were completed is comparable: Figure 2. Comparator appeal group type was not a factor in represented appellant appeal outcome. Litigation progression and appeal outcomes for the two represented litigant types was similar for Study Appeals of FC trials, FC judicial reviews, and TCC appeals: Table 3.

However, while the Crown and non-Crown represented appellants completed their appeals at similar rates, appeal success for these two populations was markedly different: Figure 1. Crown appeals were granted at a 2.34-fold greater frequency than appeals by non-Crown represented appellants. This sharply different success rate does not appear to have been previously identified. While its exact cause is unclear, this pattern is consistent with Galanter’s observation that “repeat players”, such as the US government, exhibit higher appellate success rates.<sup>54</sup> McCormick’s investigation of SCC litigation between 1949-1992 confirmed that the Canadian federal government has been more successful at the SCC than other governments, businesses, and private actors.<sup>55</sup> However, the litigation advantage reported by McCormick nowhere approaches the observed Crown success rate at the FCA.

Possible, and not necessarily exclusive, explanations include:

1. Some of the Attorney General of Canada’s lawyer complement are individuals who are highly experienced and skillful in conducting FCA proceedings. These specialists outclass private lawyers who may only operate intermittently, or rarely, in the Federal Courts.
2. The Attorney General of Canada has limited litigation resources, “picks its fights”, and selectively pursues FCA appeals that:
  - a. have a higher probability of success,
  - b. involve factual scenarios with broader factual implications, and/or
  - c. have broader legal precedent implications.
3. Private appellants may be more likely to pursue “long shot” appeals on a cost-benefit basis. For example, a large corporation may elect to pursue a weak TCC appeal because the litigation cost of the FCA appeal is much lower than the potential tax benefit, if the appeal is granted.
4. The subject matter of FCA appeals may inherently favour the Crown. For example, tax-related proceedings place the onus on the taxpayer to “demolish” assumptions made by taxation authorities.<sup>56</sup> Actions by

<sup>54</sup> Marc Galanter, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9:1 *Law & Soc’y Rev* 95; Marc Galanter & Robert W Gordon, *Why the Haves Come out Ahead: The Classic Essay and New Observations* (New Orleans: Quid Pro, 2014).

<sup>55</sup> Peter McCormick, “Party Capability Theory and Appellate Success at the Supreme Court of Canada, 1949-1992” (1993) 26:3 *Can J Pol Sci* 523 at 532.

<sup>56</sup> *Johnston v Minister of National Revenue*, [1948] SCR 486 at 490, [1948] 4 DLR 321.

government actors and tribunals that may be challenged in the FC are protected by a presumption of regularity,<sup>57</sup> and the scope of judicial review.<sup>58</sup>

Only 1 in 20 self-represented appellants met with any degree of appeal success. Arguably, this observation is not a surprise, since the usual SRL narrative is that persons without lawyers find Canadian law and legal procedure complex and challenging.<sup>59</sup> A different, but not necessarily alternative, explanation is that SRLs are more likely to pursue hopeless litigation.

The latter alternative is supported by investigation of SRL SCC leave to appeal applications that concluded 82.7% of SRL filings had little potential for success.<sup>60</sup> Almost half of SCC SRL leave to appeal applications were substantially defective incoherent documents that did not permit a meaningful response, many appeals only challenged findings of fact, and additional SCC SRL applications were hopeless or abusive litigation.<sup>61</sup> The same issues may also be at play in FCA SRL litigation.

What is clear from this study is that self-represented appellants are much more likely than represented appellants to abandon their appeals, or fail to pursue their appeals in a timely manner: Figures 2, 10A-D, Tables 3-4.

Written and reported judgments may provide additional information and context to better understand why the 2016 and 2017 FCA SRLs met with such little success. A decision-based quantitative, statistically valid investigation is feasible for FCA proceedings that completed the appeal process through to the hearing stage. 99.7% (N=336) of FCA Study Appeals that were heard by a three-judge panel resulted in a reported decision.<sup>62</sup>

Ready access to documentary explanations of the Court's analysis and conclusion differentiates the FCA from trial-level courts. The large majority of court trial reasons are not readily available in a documentary form.<sup>63</sup> Other appellate courts may share this judgment-based research strategy opportunity characteristic.

While analysis of FCA decisions that dismissed Study Group represented litigant and SRL appeals is feasible, that investigation is outside the scope of this article.

A written decision-based investigation methodology is not, however, viable to evaluate SRLs whose FCA litigation terminated prematurely. Only 4.7% (N=214) of Study Appeals that terminated prior to a full hearing led to a reported decision. Additional facts and reasons might be extracted from the Orders that terminated SRL litigation, as recorded in FCA Judgment and Order Books (J. & O. Books). Whether J. & O. Book orders might provide a useful documentary basis for analysis first requires evaluation of the content of those items.

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<sup>57</sup> See e.g. *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181 at 208, 41 DLR (4th) 429.

<sup>58</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

<sup>59</sup> Certain US investigations have concluded that in some circumstances legal representation has no or little benefit over self-representation: e.g. D James Greiner & Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (2012) 121:8 Yale LJ 2118; Jeanne Charn, "Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services" (2013) 122:8 Yale LJ 2206.

<sup>60</sup> Netolitzky, "Applications", *supra* note 21 at 895.

<sup>61</sup> *Ibid* at 890-95.

<sup>62</sup> The exception was Apotex Inc A-334-17 where the parties settled the dispute post-hearing but prior to release of a written decision.

<sup>63</sup> Netolitzky, "Appellants", *supra* note 24 at 158-60.

## B. Times Required to Conduct and Complete Appeals

The time required for individual Study Appeals to reach a final conclusion followed two very different patterns. Appeals that discontinued or were dismissed pre-hearing occurred frequently in the first year after an appeal was filed, but were rare after that point: Figure 4. SRL outliers to this pattern were largely Known Vexatious SRLs: Figure 26B.

Study Group appeals that continued through the full FCA procedure exhibit a normal distribution, with most appeals completed one- to two-years post-filing: Figure 4. SRL conduct type did not affect this pattern: Figure 26A.

Comparator appeal type and appellant representation had little relationship to the time to complete Study Group proceedings: Table 5; Figures 5A and 5B. This observation contradicts the stereotype that litigation that involves an SRL is slower and requires more time to complete. Instead, self-represented appellants had the shortest median time to complete their Study Group appeals: Table 5.

The time required to complete three FCA litigation steps was investigated, time: 1) to complete the appeal record, 2) to then reach the panel hearing, and 3) for release of the final post-hearing FCA decision. Step one is driven by the appeal litigants, and involves preparing the “appeal book”, a collection of documents, transcripts, and filings relevant to the appeal.<sup>64</sup> While the appellant prepares the appeal book,<sup>65</sup> both parties shall collaborate to determine the appeal book’s contents,<sup>66</sup> subject to court oversight.<sup>67</sup> In theory, the *FC Rules* require this process to be complete within 60 days of the appeal being filed,<sup>68</sup> however the mean duration of this step for Study Appeals was 114 days (N=406). Figure 6 shows most Study Appeals completed this step at least close to the target timeline. The timeline for Crown and non-Crown appellants to complete their appeal record was comparable, but self-represented appellants on average required around two months longer, a statistically significant difference: Figure 7. This observation suggests the appeal record stage is a significant procedural hurdle for self-represented FCA appellants.

The second step tracked in this study is the interval between completion of the appeal record and the full-panel hearing. This period includes several mandatory deadlines that total 80 days for the parties to prepare memoranda of fact and law,<sup>69</sup> and then “requisition” an appeal hearing.<sup>70</sup> On average, the second step took 258 days (N=337) for Study Appeals, with the normal distribution centred on about seven months: Figure 6. Institutional congestion and limited judicial resources plausibly contribute to the duration of this step. All three litigant types completed the appeal record to hearing stage in a statistically comparable manner: Figure 8.

Unlike the previous steps where litigant activity (or inactivity) are the dominant or a contributing cause for delay, the final stage of the FCA appeal process, time post-hearing to prepare a final appeal decision, is entirely dependent on the Court. While the mean time for Study Appeals to complete this step is 75 days, Figures 6 and 9 demonstrate that the FCA cleared its reserved decisions at an impressive pace. Half of all written decisions were issued in under a month. SRL appeal decisions usually issued within only a few days of the FCA panel hearing. 59.1% (N=66) issued within a week of the hearing.

Possible explanations for that pattern are that FCA hearing panels had already decided most SRL appeals based on written argument so that the panel hearings were more a formality than anything else,

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<sup>64</sup> *FC Rules*, *supra* note 53, s 344(1).

<sup>65</sup> *Ibid*, s 343(5).

<sup>66</sup> *Ibid*, s 343(1).

<sup>67</sup> *Ibid*, s 343(3).

<sup>68</sup> *Ibid*, ss 343(1), 345(1).

<sup>69</sup> *Ibid*, ss 346(1-2).

<sup>70</sup> *Ibid*, s 347(1).



and/or that most SRL appeals did not raise significant legal issues that required substantial judicial analysis and deliberation. A study that reviews FCA reported decisions of SRL appeals could clarify that question.

### **C. Pre-Hearing Termination of Study Appeals**

A substantial portion of FCA Study Appeals did not complete the full appeal process: Figures 2-3. Figures 10A-D show that Study Appeals filed by represented and self-represented appellants that terminate prematurely follow different patterns. Relatively few (16.5%, n=63) appeals conducted by represented appellants did not reach a full hearing, but nearly half (49.1%, n=83) of SRL Study Appeals never completed the appeal book milestone. However, 80.7% (n=67) of those SRL appeals that did complete the appeal record continued to a full hearing. Like the timing data discussed above (Figure 7), this observation suggests that if SRLs face a significant procedural obstacle when conducting FCA appeals, then that obstacle is the appeal book stage.

Most (75.9%, n=63) SRL appeals that terminated prior to the appeal book stage were dismissed rather than voluntarily discontinued. Table 4 shows that when SRL proceedings terminate early that the majority of dismissed appeals were dismissed for delay (69.2%, n=54), rather than because the appeal was hopeless, abusive, or presumptively abusive (24.4%, n=19).

The low frequency at which SRL appeals complete their appeal records has a range of non-exclusive explanations, including SRLs:

1. could not complete the appeal book,
2. lost interest in the appeal at an early point in the proceeding, and abandoned or discontinued the appeal, and/or
3. did not intend to pursue an appeal, but had initiated FCA proceedings to delay enforcement of lower court decision.

Review of individual docket records and filings might help evaluate what factors contribute to the SRL appeal book step barrier. A more definitive explanation might also be obtained by a qualitative survey investigation of FCA SRLs who did not complete the appeal book step.

Nevertheless, what can be concluded with some confidence is that if there is a point in the FCA procedure where SRLs may benefit from assistance, that is in completing the appeal record. Once SRLs passed that hurdle, nearly all continued to a full appeal hearing, and then their appeal was almost always dismissed on its lack of merit.

### **D. Document and Record Volume, and R**

To the authors' knowledge, this investigation is the first attempt to measure legal proceeding activity and complexity in a Canadian court for a complete population of litigation and litigants. To be explicit, docket document and record number is not a direct measurement of the complexity and cost of a court proceeding. However, docket activity variables are logically linked to those two characteristics.

Document volume is an indirect measurement of litigation steps, interlocutory issues and applications, and judicial decision-making in the form of court orders and decisions. Similarly, the number of records in excess of docket document number is an indirect measurement of Registry activity and non-issue related court litigation management processes and steps.

Expressed another way, document number is related to appeal and interlocutory issue complexity. Record number is a kind of measurement of the amount of Registry activity that was involved to bring an appeal to its ultimate conclusion. These two variables cannot be readily transformed and quantified so that

they are an exact time and cost analysis, but docket document and record volume potentially provide some insights into how different circumstances and factors impose different workloads on the FCA and its administration.

Tables 6-8 and Figures 12A-C and 13A-C demonstrate three critical points. First, SRL appeals do not involve more documents than appeals conducted by represented appellants. That implies that the volume of litigation steps and interlocutory issues is comparable for FCA appeals initiated by these appellant types.

Second, SRL appeal dockets on average include more records, which implies more non-issue related Registry actions and litigation management steps. While this distinction is statistically significant, on average the additional “Registry workload” per self-represented appellant is quite modest, 14% more docket records: Table 8.

Third, SRL appeals that were dismissed by the FCA prior to the full panel hearing stage are the exception. This SRL appeal type has both more docket documents (Figure 12C; Table 7) and docket records (Figure 13C; Table 8). SRL appeals that are dismissed pre-appeal hearing also have, on average:

1. almost twice as many docket records as represented appellants with prematurely terminated appeals (198%: SRLs: mean=54.5, N=75; represented litigants: mean=27.5, N=122);
2. over twice as many docket records as when an SRL voluntarily discontinues his or her appeal (228%: prematurely terminated SRL appeals: mean=54.5, N=75; discontinued SRL appeals: mean=23.9, N=26); and
3. almost as many docket records as completed appeals by represented litigants (97.1%: SRLs: mean=54.5, N=75; represented litigants: mean=56.1, N=271).

These differences suggest FCA SRL appeal activity follows two general patterns: 1) SRL proceedings that complete the appeal process or are voluntarily discontinued, versus 2) SRL appeals that are dismissed because of a litigation defect, or the appeal is eventually abandoned and dismissed for delay.

Notably, the latter category has nearly the same associated “workload” as full appeals by represented appellants or SRLs. That means that FCA institutional workload cannot be accurately measured by counting the number of post-hearing judgments. SRL appeals prematurely terminate at very high frequency: Figures 2-3, 10B-D. Prematurely terminated SRL appeals are therefore a substantial but largely invisible workload imposed on the FCA by SRLs.

The highly stable R relationship in Figure 15 is striking. Whether litigation in other courts exhibits the same kind of document to registry/clerk activity linkage is, at best, a guess. Nevertheless, the fact that FCA litigation exhibits a relationship that is this strong, and that R remains the same in appeal proceedings that vary from simple to highly complex and lengthy, suggests a larger pattern in court dispute activities. The fact that R is so stable means that R could be used as a predictive tool to estimate institutional and judicial workload. If legislation assigns a new court procedure or proceeding to the FCA’s jurisdiction, then the relative volume of documents anticipated for that process may be used to estimate the impact on Registry workload and judicial complement requirements. For example, a structured court procedure that on average involved 10 documents could be expected to create about a third of the Registry and justice workload as a typical FCA appeal.

R is consistent for both complete and incomplete FCA proceedings. That suggests R might be useful as a simple metric to monitor appeals for atypical activity and progression. If R shifts substantially above the usual ratio, then that could trigger review of the appeal and its status, and whether judicial appeal management might be appropriate. Study Appeals with atypically high R scores are almost always SRL appeals: Figure 19. Atypically high R values are also a characteristic of litigation conducted by Known

Vexatious SRLs: Table 11. These observations suggest a very simple docket database inquiry could direct appeal management to where intervention is most needed.

### E. Problematic SRL Activity

The Netolitzky SCC investigations established the Distillation Effect exists.<sup>71</sup> Many SRLs active at the SCC are abusive litigants. However, the potential scope of problematic SCC litigation activities by abusive SRLs is restricted by that Court's mandatory leave to appeal requirement that was implemented to minimize "frivolous" litigation.<sup>72</sup>

That makes the current FCA SRL study the first investigation to quantify how abusive SRLs conduct *full* appeal proceedings that were not subject to prospective pre-filing gatekeeping. The activity of FCA Problematic SRLs can be compared, "side-by-side", with appeals by represented appellants. FCA appeals conducted by lawyers provide a type of control population of "good faith, fair dealing" litigants who engage the Court in a generally competent, non-abusive manner.<sup>73</sup>

The observations from this investigation lead to several conclusions.

#### 1. Problematic SRL Activity is Probably Underestimated

The volume and frequency of problematic SRL litigation has likely been underestimated for a number of reasons. First, legal researchers sometimes evaluate court activity by counting written "reported" decisions.<sup>74</sup> For example, the National Self Represented Litigant Project has purportedly measured and classified the incidence of "vexatious" litigation on this basis.<sup>75</sup>

This "head count" approach is ill-suited to study problematic SRL activity.<sup>76</sup> Much problematic litigation is "invisible". For example, Study Appeals that terminated pre-hearing rarely resulted in a reported court judgment: Part IV(A). A file or docket-based methodology is necessary to identify, measure, and evaluate abusive litigation.

Second, the frequency at which Study SRLs were identified as Known Vexatious or Known Abusive SRLs was almost certainly an underestimate. The methodology used to measure the incidence of these characteristics underreports their actual frequency due to false negatives.<sup>77</sup>

Third, the "Known Vexatious" and "Known Abusive" characteristics do not reflect the actual conduct of a given Study SRL, but instead are an "earned status". For example, when a court imposes court access restrictions on a problematic litigant, that simply means that the court has identified pre-existing bad conduct that, in the court's opinion, warrants prospective litigation gatekeeping. There are probably

<sup>71</sup> Netolitzky, "Appellants", *supra* note 24 at 158-61; Netolitzky, "Repeat Litigants", *supra* note 26 at IV(E).

<sup>72</sup> *Supreme Court Act*, RSC 1985, c S-26, ss 40(1-2), 58-59; Bertha Wilson, "Leave to Appeal to the Supreme Court of Canada" (1983) 4 Adv Q 1 at 2-3.

<sup>73</sup> Considering represented litigation as a kind of control population does, admittedly, assume that lawyers operating at the FCA are generally competent and act in compliance of their professional obligations.

<sup>74</sup> See e.g. Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (November 2015) [unpublished], online (pdf): *NSRLP* <representingyourselfcanada.com/wp-content/uploads/2016/12/NSRLP-The-Use-of-Summary-Judgment-Procedures-Against-SRLs.pdf> [perma.cc/2JJK-GXNY]; Donald J Netolitzky & Richard Warman, "Enjoy the Silence: Pseudolaw at the Supreme Court of Canada" (2020) 57:3 Alta L Rev 715.

<sup>75</sup> Megan Campbell & Julie Macfarlane, "Self-Represented Litigants & Legal Doctrines of "Vexatiousness"" (December 2019) [unpublished], online (pdf): *NSRLP* <representingyourselfcanada.com/wp-content/uploads/2019/12/Vexatious-Litigant-Report-Final.pdf> [perma.cc/24HX-A8JW].

<sup>76</sup> In prior research concerning abusive SRLs operating at the SCC, the authors identified this limitation of the "head count" methodology and cautioned on reliance upon this kind of data: Netolitzky & Warman, *supra* note 75 at 737-38.

<sup>77</sup> Netolitzky, "Appellants", *supra* note 24 at 158-60; see also Part II(C), above.

additional SRLs in the Study Population whose activities warrant court litigation gatekeeping. However, no one has filed the application to trigger that, yet.

## 2. The Distillation Effect

The present study is consistent with the Distillation Effect hypothesis that abusive litigants are over-represented and more “concentrated” in appellate forums because some abusive litigants persistently pursue appeals and relitigate issues and disputes.<sup>78</sup> The Distillation Effect predicts that as SRLs pass through successive tiers of dispute resolution processes, non-abusive SRLs should drop off, while abusive SRLs will continue to pursue their disputes. The net result is that abusive litigants are “distilled out” and concentrated into appellate forums. Both the Quebec Court of Appeal and Ontario Court of Appeal report this phenomenon: that in these courts difficult and abusive SRLs are disproportionately common.<sup>79</sup>

The Distillation Effect should be most pronounced at the SCC. In 2015-2017, 19.6% of SRLs at the SCC were Known Vexatious SRLs.<sup>80</sup> The frequency at which SRLs at the SCC are subject to court access restrictions is startling, considering the rarity of “vexatious litigant orders”.<sup>81</sup> That observation, and the observation that 45.7% of the 2015-2017 SCC SRLs were Known Abusive SRLs,<sup>82</sup> supports the Distillation Effect hypothesis.

The FCA SRL population also had a high incidence of problematic litigation characteristics: 1) court access restriction orders were identified for 10.6% of Study SRLs, and 2) courts had found that 44.4% of Study SRLs had engaged in abusive litigation. The high identified frequency of these characteristics strongly supports that the Distillation Effect also occurs at the FCA, but perhaps to not the same extent as observed at the SCC.

## 3. Abusive Litigation Originating from Federal and Tax Courts

Three SRL Study Appeal comparator group subpopulations exhibit very different litigation conduct history profiles. SRL appellants emerging from the FC have a dramatically higher identified litigation misconduct frequency than self-represented appellants challenging TCC rulings: Figure 24.

Over three quarters (76.3% N=59) of SRL FC trial appeals had either an identified abusive litigation record or were subject to vexatious litigant orders. In stark contrast, only somewhat over a quarter (28.4%, N=81) of TCC appeals were conducted by Problematic Litigation SRLs. Only one (1.2%, N=81) TCC Study Appeal was conducted by an SRL known to be subject to court access restrictions. 36% (N=59) and 31% (N=29) of FC trial and judicial review appeals were conducted by Known Vexatious SRLs.

The contrast between SRLs emerging from the FC and TCC is startling. SRLs are usually described as being good faith, fair dealing, and non-abusive litigants. The SRL narrative is that “bad apple” SRLs are rare and exceptional. The TCC self-represented appellants match that profile. These SRLs usually did not have an identified problematic litigation history. Many (21.2%, N=81) voluntarily discontinued their appeals, demonstrating some of these individuals were likely calculating and realistic actors who “cut their losses”.<sup>83</sup>

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<sup>78</sup> Morissette, *supra* note 31 at 285, 306, footnote 26; Netolitzky, “Comment”, *supra* note 31 at 257.

<sup>79</sup> Morissette, *supra* note 31; *Lochner*, *supra* note 32 at para 17.

<sup>80</sup> Netolitzky, “Repeat Litigants”, *supra* note 26 at III(A).

<sup>81</sup> Between 1993 and 2019 the Quebec and Alberta courts imposed around 560 court access restriction orders, a period in which at least tens of thousands of SRLs were active: Netolitzky, “Appellants”, *supra* note 24 at 160.

<sup>82</sup> Netolitzky, “Repeat Litigants”, *supra* note 26 at III(A).

<sup>83</sup> Colin Campbell, “Access to Justice in Income Tax Appeals” (2012) 63 UNBLJ 436 identifies cost/benefit factors for SRLs involved in Canadian income tax litigation.

The situation with FC decision appellants is the opposite. The majority of these SRLs exhibit abusive litigation patterns. None voluntarily discontinued appeals. The Netolitzky SCC investigation concluded abusive SRL litigants are the norm at the SCC.<sup>84</sup> The same is true at the FCA for self-represented appellants who challenged FC decisions.

While not definitive, the different characteristics of appeals emerging from the FC versus the TCC might reflect how SRLs operate in those lower-level courts. If correct, the negative implications for FC court functionality are significant. That trial court may be experiencing abusive litigation rates that greatly exceed those experienced by provincial trial courts, or the TCC.

Proposing any hypothesis to explain why FC and TCC SRL appeals are so different is premature. Instead, the next two steps are to investigate: 1) the FCA appeal grounds for the two appeal groups, and 2) the litigation conduct of SRLs at the FC and TCC. At that point, a better guess may be advanced for why these two branches of SRL appellate litigation seem so very different. At least some of these differences probably relate to the motivation of these different SRL populations, so direct interviews or surveys to identify the subjective intentions of these litigants may also be helpful, particularly as a complement to quantitative record- and document-based data.

#### 4. Characteristics of Known Vexatious FCA SRL Appellants

Seventeen Study SRLs are subject to court access restrictions in some court. Eleven were targets of *Federal Courts Act* section 40<sup>85</sup> “vexatious litigant” orders that limited their Federal Courts activities. Six<sup>86</sup> had court access restrictions imposed in a different jurisdiction, but have no identified limits that affect their FCA litigation. The latter group are potential “forum shoppers”.<sup>87</sup> Known Vexatious SRLs on average filed twice as many appeals than other SRLs in 2016-2017, and did so almost exclusively in appeals from FC proceedings. The most active vexatious Study SRL was Leopold Camille Yodjeu Ntemde, who filed eight FCA appeals in 2016 and 2017. Ntemde filed a further five FCA appeals in 2018-2019, and was ultimately made subject to an FCA vexatious litigant order in 2019.<sup>88</sup>

This study is the first investigation to examine how Known Vexatious SRLs conduct appeals. Observations suggest Known Vexatious SRLs are a discrete SRL subtype that exhibit court activity different from other SRLs and represented litigants.

1. Known Vexatious SRLs filed twice as many FCA appeals as other SRLs.
2. Appeals conducted by Known Vexatious SRLs were disproportionately terminated before reaching a full panel hearing.
3. On average Known Vexatious SRL appeals took almost twice as long to reach a final result than other SRLs.
4. Known Vexatious SRL appeals involved significantly larger volumes of court documents and docket records.
5. Known Vexatious SRL appeals were disproportionately interlocutory proceedings.

<sup>84</sup> Netolitzky, “Appellants”, *supra* note 24 at 161,163; Netolitzky, “Repeat Litigants”, *supra* note 26 at IV(E).

<sup>85</sup> *Federal Courts Act*, RSC 1985, c F-7, s 40.

<sup>86</sup> Benoit Bossé (New Brunswick), Raynald Grenier (Quebec), Immeubles Robo Limitée (New Brunswick), Katherine Lin (Ontario), Gary Sauvé (Ontario), Derek Thompson (Alberta).

<sup>87</sup> *Unrau #2*, *supra* note 47 at paras 679-85.

<sup>88</sup> *Canada (Procureur général) c Yodjeu*, 2019 CAF 178. Ntemde is also subject to court access restrictions in Quebec: *Ville de Québec c Yodjeu Ntembe*, 2020 QCCS 3056.

Interestingly, once one splits out the Known Vexatious SRL subpopulation, other SRL proceedings were not all that different from FCA appeals conducted by represented appellants.

For example, the average time to complete a Crown appeal (Table 5: 412 days, N=60), or non-Crown represented litigant appeal (Table 5: 389 days, N=323) is the same as for Known Abusive SRLs (Part III(F)(3): 389 days, N=50). On average, No Known Problematic Litigation SRL appeals were *completed almost two months faster* than matters that involved lawyers: Part III(F)(3): 339 days, N=88. In contrast, the average time to complete Known Vexatious SRLs appeals was much longer: Part III(F)(3): 633 days, N=31. Similarly, the volume of docket documents and records for appeals conducted by Known Abusive SRLs and No Known Problematic Litigation SRLs is comparable to that of represented appellants: Table 11.

But there is a further nuance to Known Vexatious SRLs litigation activity. If a Known Vexatious SRL appeal completes the appeal book stage, then, on average, that appeal continued to a full panel hearing and took no more time to complete than other SRL conduct types: Table 9; Figure 26A. In fact, Known Vexatious SRLs are significantly faster at completing their appeal records than other SRL conduct types. Stepping back to look at the broader picture, SRL litigation at the FCA as a whole followed two litigation trajectories: 1) appeals that “stalled out” prior to the appeal book stage, and 2) appeals that completed the appeal record and proceeded to a full hearing: Figures 10B-D. Known Vexatious SRL appeals “stalled out” at a higher rate (58%, N=31) than other SRL conduct groups. “Stalled out” Known Vexatious SRL appeals then took much longer to resolve (Table 10: 699 days, N=18; Figure 26B).

Appeals by Known Abusive SRLs and No Known Problematic Litigation SRLs that “stalled out” usually were then abandoned or discontinued. The FCA only rarely engaged in active litigation management to end these appeals, 21.1%, (N=19); 17.1% (N=35) respectively. In contrast, Known Vexatious SRLs never voluntarily discontinued, and only rarely abandoned their appeals. If a Known Vexatious SRL appeal ended, pre-hearing, that was usually (72.2%, N=18) because the Court had applied active litigation management steps to end or stay the appeal. Known Vexatious SRLs are thus unusually persistent in pursuing their litigation.

Known Vexatious SRL proceedings also involved more documents, records, and a higher R value: Table 11. Table 11 also illustrates a unique characteristic of Known Vexatious SRL litigation. Other SRLs and represented appellants’ appeal dockets on average have substantially fewer documents and records where a matter terminates prior to the full panel hearing. For example, complete No Known Problematic Litigant SRL appeals on average had 29.4 documents and 57.3 records. However, when appeals by that SRL conduct type terminated early, on average there were only 15 documents and 34.5 records per docket, a “litigation discount” of 49% for documents, and 40% for records. An FCA appeal that terminated early translated into a reduced Court and Registry workload.

That is not the case for Known Vexatious SRLs. This litigant group, and only this group, exhibit no “litigation discount”. Two thirds of these appeals were struck out or stayed as being vexatious or otherwise meritless. However, that case management provided no Court or Registry “workload” benefit. Complete and prematurely terminated Known Vexatious SRL appeals have the same disproportionate elevated institutional cost. This fact illustrates these SRLs are not simply a problem because they initiate many proceedings. The *manner* in which those proceedings are conducted is also unusually harmful. That factor is amplified yet further because court litigation management intervention provides no “workload” benefit.

## F. Additional Implications

This study has a number of broader implications that extend outside the FCA and the activity of litigants in that Court.

## 1. Resolution of Distinct SRL Populations

Much of the legal academic commentary in Canada has approached SRLs as a largely homogenous population that have the same court and litigation experiences, and who conduct themselves in essentially the same way.<sup>89</sup> If an SRL is described as atypical, that is because the SRL is described as encountering additional obstacles due to factors such as language, education, and disabilities.<sup>90</sup>

The 2020-2021 investigation by Netolitzky of SCC SRL candidate appellants<sup>91</sup> provided the first strong quantitative evidence that SRL populations active in different Canadian courts may be markedly dissimilar. Although Netolitzky's investigation was hampered by the fact he had no reliable comparator SRL group outside his investigation, Netolitzky did present evidence that SRL disputes at the SCC are different than the litigation subjects of trial-level SRL activity. For example, very few (6.4%, n=8) SCC SRL candidate appeals had a family law subject,<sup>92</sup> despite that dispute type purportedly being the dominant form of SRL trial litigation.

Second, Netolitzky concluded that SRLs filing candidate appeals at the SCC had been disproportionately identified by courts as having engaged in abusive litigation, or were subject to court access restriction orders as vexatious litigants.<sup>93</sup> That observation supported the Distillation Effect hypothesis:<sup>94</sup> that the proportion of problematic SRLs increases as litigation moves through successive tiers of appellate or judicial review.

The Netolitzky SCC SRL study also identified marked differences in the effectiveness of SRLs in advancing candidate appeals in that forum. Around a quarter of SRL leave to appeal applications were essentially gibberish; neither relevant facts nor issues could be identified.<sup>95</sup> In contrast, a small population, 6% (N=118) of SRLs prepared highly sophisticated materials, operating at a level comparable to trained legal professionals.<sup>96</sup>

The current study is the first investigation to quantitatively characterize and compare multiple SRL populations active in the same Court. A number of factors would seem to favour that different comparator group SRL appeal types would be similar:

- The Crown is usually the defending or responding party due to the nature of TCC and FC jurisdictions. SRLs should usually be the parties who initiated the lower court action.

<sup>89</sup> See e.g. Macfarlane, "Report", *supra* note 6. Notably Birnbaum, "Rise", *supra* note 6 at 74 cautions that in Canada the restricted SRL research focus on family dispute litigation is a limitation for many survey studies. Interestingly, Macfarlane observes a marked over-representation of respondent SRLs involved in divorce rather than common law relationship proceedings, but then proceeds to group both subpopulations together: Macfarlane, "Report", *supra* note 6 at 25. Investigations in non-Canadian jurisdictions report more complex populations and behaviour: Greacen, "Impact", *supra* note 17; Greacen, "Myths", *supra* note 17; Moorhead, *supra* note 17; Toy-Cronin, *supra* note 18; Elizabeth Richardson, Tania Sourdin & Nerida Wallace, *Self-Represented Litigants: Literature Review* (Melbourne: Australian Centre for Court and Justice System Innovation, 2012) [unpublished] [Richardson, "Literature"], online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2713503> [perma.cc/NV3A-ZR7U]; Richardson, "Impacts", *supra* note 17.

<sup>90</sup> See e.g. Canadian Judicial Council, "Statement", *supra* note 3 at 3; Birnbaum, "Rise", *supra* note 6 at 86.

<sup>91</sup> Netolitzky, "Limitations", *supra* note 20; Netolitzky, "Applications", *supra* note 21; Netolitzky, "Appellants", *supra* note 24; Netolitzky, "Repeat Litigants", *supra* note 26.

<sup>92</sup> Netolitzky, "Applications", *supra* note 21 at 870-71.

<sup>93</sup> Netolitzky, "Appellants", *supra* note 24 at 158-61.

<sup>94</sup> *Ibid*; Netolitzky, "Repeat Litigants", *supra* note 26 at III(A).

<sup>95</sup> Netolitzky, "Applications", *supra* note 21 at 876-77.

<sup>96</sup> Netolitzky, "Appellants", *supra* note 24 at 139.

- Both FC trial and TCC appeals are the first court litigation tiers, so the litigation experience of SRLs in both scenarios might be comparable. Extending that hypothesis, SRLs conducting FC judicial review appeals would possibly operate differently given the legal knowledge and litigation experience they obtained during earlier tribunal proceedings.
- All three comparator appeal group types are “person vs institution disputes”, and so do not involve interpersonal factors, such as found in family dispute subject litigation.

Instead, this investigation has uncovered significant differences in SRL FCA appeals that emerge from the different lower court litigation scenarios:

- Different appeal type comparator groups were either granted, dismissed, or discontinued in a statistically different manner: Table 2. No SRL FC trial appeals had any success (N=59), while 10.3% (N=29) of SRL FC judicial review appeals were at least partially granted.
- Appeal process completion rates varied substantially. Only 39% (N=59) of FC trial appeals reached a full panel hearing, while SRL FC judicial review appeals were 1.5 times more likely to complete the appeal process (62.1%, N=29): Table 3; Figure 3. SRL appellants challenging TCC decisions were eight-fold more likely to voluntarily discontinue their appeal than FC trial appeal SRLs: Table 3; Figure 3.
- Only FC trial appeals were terminated because the SRL was subject to a new vexatious litigant order: Table 4.
- SRL Study Appeals that do not complete the appeal process usually terminate after filing, but before the appeal record is complete. However, the reasons for why these appeals ended were very different:
  - FC trial appeals: ratio 1 to 16.9 discontinued to dismissed (N=36)
  - FC judicial review appeals: ratio 1 to 1.75 discontinued to dismissed (N=11)
  - TCC appeals: ratio 1 to 1.22 discontinued to dismissed (N=47)
 The differences between these ratios is statistically significant:  $\chi^2(3, N=94)=14.4, p=0.00074$ .

As discussed in Part IV(E), FCA appeals of FC decisions were dramatically more likely to be conducted by Known Vexatious and Known Abusive SRLs.

What can be concluded from the Netolitzky SCC study and this investigation is that there is no basis to presume that SRLs active in different courts and with different dispute types operate the same. That observation is actually neither new, nor a surprise. Researchers in the US,<sup>97</sup> UK,<sup>98</sup> and Australia<sup>99</sup> who conducted quantitative investigations of SRLs observed SRL frequency and activity is variable and context-dependent, particularly by litigation and court type. Beyond that, this conclusion is intuitively obvious. Litigation is diverse. Individual courts are very different. Some proceedings are comparatively simple, such as a bylaw or traffic ticket dispute, or a small value property claim. Others, like TCC matters, involve extremely complex legislative schemes. A personal injury tort claim may be straightforward as far as procedure goes, but then have evidentiary complexity resulting from the requirement for and weighing of expert technical evidence. While most civil disputes that involve SRLs advance through a set of steps to a (hopefully) final resolution, family litigation disputes that involve children may drag on for extended periods.<sup>100</sup>

The diversity of SRLs and SRL proceedings has important methodological implications for future research that investigates litigation by these persons. Investigations of SRLs are more likely to provide

<sup>97</sup> Greacen, “Impact”, *supra* note 17 at 33-35; Greacen, “Myths”, *supra* note 17 at 664, 667-68.

<sup>98</sup> Richardson, “Literature”, *supra* note 90.

<sup>99</sup> Moorhead, *supra* note 17 at 125-27, 247-52.

<sup>100</sup> Justice Guerette stresses the duration of family law disputes is unique, because “[i]t is not over when it’s over.”: Raymond Guerette, “Accessing Justice in the Family Courts of New Brunswick” (2012) 63 UNBLJ 49 at 51.



useful and representative results when that investigation *focuses on specific SRL populations*. The critical characteristic of a useful investigation is that the *resolution* of the study allows identification of different populations and outcomes. In science, *resolution* is a measurement of whether an instrument or mechanism is able to distinguish between two different entities. For example, only one entity is visible when Jupiter is viewed with the naked eye. However, even a modest telescope provides adequate *resolution* to show that Jupiter is orbited by four moons. Jupiter, as a system, involves five large discrete components.

*Inadequate resolution* distorts observed characteristics. When positioned close together, a red and green light merge to appear as a single yellow spot. Increased *resolution* separates the two light sources and demonstrates very different colour characteristics. The yellow colour observed with *inadequate resolution* is misleading information.

Several critical conclusions of this study were only obtained because the experiment's design provided adequate resolution. Figures 1 and 2 show Study Appeals conducted by represented litigants and SRLs have very different outcomes. That, in itself, is valuable information. However, Figure 3 then "resolved" a further layer of complexity, that SRL appeals from the FC and TCC are very different. As previously discussed, that is a very interesting and significant result.

Similarly, docket document, record, and R values for SRLs and represented litigants are different: Part III(E)1-2, 3(b). However, resolving SRLs into three litigation conduct subtypes revealed atypical SRL docket activity was concentrated largely in the Known Vexatious SRL subpopulation: Table 11.

It is too early to say what level of resolution is ideal to meaningfully characterize and understand SRL populations. What this study illustrates is "higher magnification" is better. Any "unnecessary resolution" is not an issue. Subpopulations that are not statistically distinct may be merged. For example, Crown appellants and non-Crown represented appellants were grouped in Part III(E)(4) when evaluating  $T_D$  and  $T_R$ . These two populations had previously been identified as exhibiting no statistically different pattern in the time these subpopulations took to complete FCA appeal steps.

This "high magnification" and "high resolution" approach to studying SRL litigation may become less necessary in the future. Broader patterns may emerge after multiple SRL populations are accurately characterized and described. However, at this point, "more is better".

## 2. SRL Activity at the Federal Court

The difference in frequency of problematic litigants, and especially Known Vexatious Litigants, between FCA appeals originating in the FC and TCC is startling: Figure 24. The odds are remote that this apparent link between source lower court and abusive litigation conduct is an artifact. The only explanation is that self-represented appellants emerging from those two courts have very different characteristics. That also implies that SRL activity in the lower courts may be different. If so, the FC is potentially encountering an unusual frequency and/or volume of abusive SRLs.

The next logical step is a closer investigation of FC SRL activity. Despite its name, the FC is now primarily an immigration decision review court. In 2016 and 2017, 75.3% (N=14,458) of new FC proceedings were immigration matters.<sup>101</sup> In those years 22.5% (N=10,885) of those applications were granted leave. However, none of the Study Appeal SRL matters have FC immigration docket numbers.

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<sup>101</sup> "Statistics (December 31, 2016)", online: *Federal Court* <[www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics-december-31-2016](http://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics-december-31-2016)> [perma.cc/ZG4H-VQU6]; "Statistics (December 31, 2017)", online: *Federal Court* <[www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics-december-31-2017](http://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics-december-31-2017)> [perma.cc/6AUQ-M2XH].

The predominately abusive SRL litigants emerging from the FC therefore belong to one of the less common FC litigation categories.

The FC publishes activity statistics on a quarterly basis.<sup>102</sup> Table 12 combines data from the 2016 and 2017 FC statistics, and the FC docket record “Nature of Proceeding” category for FCA SRL Study Appeals, excluding immigration matters:

**Table 12 - Comparison of the Frequency of Federal Court Non-Immigration Proceedings Initiated in 2016-2017 and Federal Court of Appeal SRL Appeals of Federal Court Proceedings Initiated in 2016-2017**

	N	% of New Non-Immigration Subject Federal Court Proceedings	N	% of SRL Federal Court of Appeal Study Appeals Appealing Decisions of the Federal Court
Aboriginal Law	101	2.8%	0	0%
Access to Information/Privacy	55	1.5%	2	2.3%
Admiralty	239	6.7%	0	0%
Citizenship	454	18.9%	2	2.3%
Income Tax	7	0.2%	2	2.3%
Intellectual Property	640	17.9%	2	2.3%
Judicial Review	1218	34.1%	39	44.3%
Other Crown	496	13.9%	33	37.5%
Other Statutory Appeals and Applications	10	0.3%	0	0%
Patented Medicine Regulations	77	2.2%	0	0%
Prairie Grain Advance Payments	55	1.5%	0	0%
Preliminary - Application for Leave	NA	NA	2	2.3%
Preliminary - Extension of Time	NA	NA	6	6.8%

Table 12 - Comparison of the frequency of non-immigration FC matter categories in all FC proceedings initiated in 2016-2017, and all SRL FCA Study Appeals of FC decisions. “NA” = non-applicable. Proceeding category for Study Appeals was obtained from the “Nature of Proceeding” type for the FC docket appealed from. For Study Appeals the “Other Crown” category is composed of appeals where the FC docket “Nature of Proceeding” was either “Others - Crown (v. Queen) [Actions]”, “Others - not provided for anywhere else (Actions)”, and “Tort (v. Queen)”. The “Preliminary - Application for Leave” and “Preliminary - Extension of Time” non-immigration FC matter categories do not appear to be reflected in the FC statistics.

The Table 12 data shows FCA appellant SRLs are overrepresented where the FCA Appeal challenged a decision that involves Crown liability (“Other Crown”) and are all but absent from many non-immigration FC matter categories: e.g. admiralty law and intellectual property litigation. Another interesting observation is that nearly one in ten SRL Study Appeals that challenge an FC decision (“Preliminary - Application for Leave”; “Preliminary - Extension of Time”) target pre-filing steps where the FC refused filing by an SRL.

It is premature to draw any conclusions on how SRLs operate at the FC. That said, these observations suggest SRLs at the FC are disproportionately involved in certain types of FC litigation, and that the FC is facing an unusual volume of problematic SRLs. A docket-based investigation of FC SRLs is clearly warranted to better understand these unusual observations, and, more generally, what is going on in this Court.

### 3. Abusive Litigation and Litigant Management

This study provides new insights into three aspects of abusive litigation and litigant management, how to:

1. identify problematic litigants and litigation,
2. manage abusive litigation, and
3. manage abusive litigants.

<sup>102</sup> “Statistics”, online: *Federal Court* <[www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics](http://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics)> [perma.cc/824K-TPKC].

As previously discussed, Problematic Litigation SRLs were disproportionately frequent in appeals originating from the FC, but not TCC appeals. That observation implies some SRL populations have a comparatively low risk for abusive litigation. TCC self-represented appellants voluntarily discontinued their appeals: Figure 3. TCC appeals that terminated pre-hearing usually were abandoned, rather than dismissed: Table 4. Few TCC self-represented appellants were Problematic Litigation SRLs: Figure 24. Appeals emerging from the FC exhibit very different and negative characteristics. If the FCA were to engage in SRL litigation screening, focusing on SRLs emerging from the FC promises a much greater cost/benefit ratio.

Known Vexatious Litigants could be identified by their docket activity volume: Table 11. Appeals that exceed certain document and/or record volume thresholds could trigger administrative and/or judicial oversight. That said, elevated R values are both linked to known court access restrictions, but also when SRL appeals “stalled out”, prior to the appeal book litigation milestone: Table 11.

Another important observation is that many FCA Known Vexatious Litigants have an abusive litigation record in other courts. Real benefits could result if there were a way to readily identify and address these apparent “forum shoppers”.<sup>103</sup> As Justice Stratas observed in *Canada v Olumide*, when it comes to abusive litigant gatekeeping:<sup>104</sup> “The wheel needn’t be reinvented.”

Unusual SRL SCC litigation volume has been proposed as a diagnostic test to evaluate the risk of lower court abusive litigation.<sup>105</sup> SRL appellants could be instructed to disclose their SCC activity as part of an appeal application.

Known Vexatious SRLs are disproportionately likely to file interlocutory appeals from FC proceedings: Figure 27. Problematic interlocutory appeals could be interdicted by a mandatory leave to appeal requirement for that appeal type.

Commenting on the larger relevance of this study to managing abusive litigants first requires review of a broad split in Canadian and Commonwealth jurisprudence. One approach to address abusive litigants builds from the UK Court of Appeal *Ebert v Birch*<sup>106</sup> and *Bhamjee v Forsdick (No 2)*<sup>107</sup> decisions. UK courts principally address abusive litigation and litigants from a problem-solving perspective: identifying individuals who misuse court processes and implementing context-sensitive gatekeeping steps focused to defend and protect court functionality. This “Modern Approach”<sup>108</sup> applies court inherent jurisdiction in a flexible results-based manner. The key questions are what litigation misconduct is foreseeable, and, based on that, what proportionate gatekeeping steps should be implemented.

The Modern Approach reacts against the traditional view that court access is sacrosanct, and that any impediment to “one’s day in court” is anathema within the common law tradition.<sup>109</sup> Jurisprudence based in this second perspective describes “vexatious litigant orders” as “an extraordinary remedy”<sup>110</sup> that may

<sup>103</sup> *Unrau #2*, *supra* note 47 at paras 1032-36 discusses potential responses.

<sup>104</sup> *Canada v Olumide*, 2017 FCA 42 at paras 37-38 [*Olumide*].

<sup>105</sup> Netolitzky, “Repeat Litigants”, *supra* note 26 at IV(F)(1).

<sup>106</sup> *Ebert v Birch*, [1999] EWCA Civ 3043 (UK CA).

<sup>107</sup> *Bhamjee v Forsdick (No 2)*, [2003] EWCA Civ 1113 (UK CA).

<sup>108</sup> Reviewed in *Unrau #2*, *supra* note 47 at paras 403-57.

<sup>109</sup> See Benjamin Lévy, “From paranoia querulans to vexatious litigants: a short study on madness between psychiatry and the law. Part 1” (2014) 25:3 *History Psychiatry* 1; Benjamin Lévy, “From paranoia querulans to vexatious litigants: a short study on madness between psychiatry and the law. Part 2” (2015) 26:1 *History Psychiatry* 36; and Morissette, *supra* note 17 for discussion of how this element of the common law tradition is dysfunctional.

<sup>110</sup> See e.g. *Lukezic v Royal Bank of Canada*, 2012 ONCA 350 at para 12; *Ayangma v Prince Edward Island (Attorney General)*, 2004 PESCAD 11 at para 59; *Lymer*, *supra* note 14 at para 12.

only be employed as a last resort, “when other procedural techniques are ineffective.”<sup>111</sup> The recent Alberta Court of Appeal *Jonsson v Lymer* decision is an extreme example of this “Traditional Approach”,<sup>112</sup> prohibiting gatekeeping intervention except after repeated bad litigation conduct, where allegedly less intrusive steps such as case management have already failed, and “reading down” the explicit legislative authority<sup>113</sup> granted to Alberta courts to protect their own processes.<sup>114</sup> Alberta courts are directed to take a “hands off” approach to abusive litigants; opposing litigants solely dictate and direct what management steps may be appropriate.

Not all Canadian courts share this perspective. Justice Stratas of the Federal Court of Appeal has observed:

... vexatious litigant orders are not as drastic as the applicant contends. They do not bar access to the courts: instead, they regulate it. They are designed to protect the Court, its scarce resources, and the parties before it while maintaining the litigant’s right to legitimate and necessary access to the Court ...<sup>115</sup>

Similarly, in *Lochner v Ontario Civilian Police Commission*, the Ontario Court of Appeal recently highlighted the harm that abusive litigants cause to court function:

Vexatious litigants are a drain on our system of justice. In addition to being a burden on the opposing parties, they are a burden on the judiciary and court personnel. At least the judiciary has mechanisms to attempt to address the conduct of vexatious litigants, but court personnel are ill-equipped to do anything when faced with a barrage of telephone calls, emails, and other communications frequently characterized by incendiary and rude remarks. The cost and time incurred by opposing parties is significant, and adverse costs awards frequently cannot be relied upon to discourage future comparable behaviour.<sup>116</sup>

The approach taken in decisions like *Jonsson v Lymer* ignores four factors. First, psychiatric experts have uniformly concluded that abusive litigation is a mental health phenomenon resulting from distorted thinking processes and pathologies triggered by dispute processes.<sup>117</sup> The traditional “hands-off” approach to abusive litigant management runs opposite to the advice from these experts, who instead recommend early, firm, consistent intervention.<sup>118</sup>

Second, prospective court access gatekeeping is not “extraordinary”. Instead, it is the litigants who engage in abuse of court processes who are “extraordinary”,<sup>119</sup> even when their frequency and

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<sup>111</sup> *Lymer*, *supra* note 14 at para 12.

<sup>112</sup> Reviewed in *Unrau #2*, *supra* note 47 at paras 388-402.

<sup>113</sup> *Judicature Act*, RSA 2000, c J-2, s 23.1(1).

<sup>114</sup> *Chisan v Akers*, 2020 ABQB 746 at para 22; *Miller v Edmonton (City)*, 2020 ABQB 784 at para 29; *Simon v Feeney*, 2020 ABQB 641 at para 94.

<sup>115</sup> *Bernard v Canada (Attorney General)*, 2019 FCA 144 at para 25.

<sup>116</sup> *Lochner*, *supra* note 32 at para 18.

<sup>117</sup> See e.g. Gary M Caplan & Hy Bloom, “Litigants Behaving Badly: Querulousness in Law and Medicine” (2015) 44:4 *Adv Q* 411; Paul E Mullen & Grant Lester, “Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour” (2006) 24 *Behav Sci & L* 333, see also Morissette, *supra* note 15, Netolitzky, “Appellants”, *supra* note 24 at 123-25.

<sup>118</sup> Caplan & Bloom, *ibid* at 450-51; Mullen & Lester, *supra* note *ibid* at 347-48.

<sup>119</sup> Netolitzky, “Appellants”, *supra* note 24 at 158-61; Kennedy, *supra* note 14 at 754-56.

concentration is amplified via the Distillation Effect.<sup>120</sup> Even though the FCA is under significant pressure due to abusive litigation (Figure 24), that litigation is only originating from a comparatively small number of problematic actors. Prospective litigation management is thus an “ordinary tool” for “extraordinary litigants”.

Third, abusive litigants victimize court staff and damage court function. Parties to litigation have no reason to concern themselves with or react to that kind of injury. The Modern Approach recognizes *courts need to defend themselves*. All Canadian courts and tribunals should have the authority, either via legislation or inherent jurisdiction, to protect their own functionality in an operationally effective manner that does not rely on party self-interest.

Most importantly, the observations in this study show that *incremental litigation management of vexatious litigants simply does not work*. The Known Vexatious SRLs inflicted the same volume of abnormal and elevated Court and Registry workload even when their appeals were terminated prior to a full hearing. There was no “litigation discount” obtained by case management, security for costs, or striking out these applications. Known Vexatious SRL appeals that were subject to active FCA litigation management required much more time to terminate. The only tool that prevents Known Vexatious Litigants from their excessive waste of court and litigant resources is to preemptively screen out their bad litigation by court access gatekeeping.<sup>121</sup> Meaningful management of these abusive litigants is only possible where “vexatious litigant” gatekeeping is imposed early, rather than as a last resort, and after too much delay, injury, and waste has already occurred.

## V. CONCLUSION

Netolitzky, “Appellants”<sup>122</sup> proposed a metaphor to describe our current understanding of Canadian SRLs and the implications of that investigation of SRLs active at the SCC in 2017. The 2017 SCC SRL results were a jigsaw puzzle piece in a larger, and, as of yet, poorly understood picture of Canadian SRLs as a whole. Extending that metaphor, the current study of SRLs operating at the FCA is a second piece that attaches to the first puzzle piece.

Parallel investigation of SRL litigation in these two appeal courts has identified certain common characteristics, such as that SRL appeals are largely unsuccessful, and a large portion of SRLs have problematic litigation records. The Distillation Effect appears to operate in both the SCC and FCA. None of this is positive news.

On the other hand, the FCA puzzle piece hints at a very different picture in other adjacent jigsaw pieces. SRLs emerging from the FC and TCC seem very different. Thus, the developing picture of SRL activity is not so simple.

In many senses this should not be a surprise. The idea that SRLs were all basically the same, and that litigation patterns observed in, for example, family law disputes, would match with other kinds of SRL litigation, never should have been accepted. Non-Canadian empirical investigation predicted a more complex and varied anatomy. Different courts and litigation proceedings exhibit a broad range of features and characteristics.

This study has also offered the first opportunity to compare represented and unrepresented appellant populations “side-by-side”. Some results run contrary to the SRL narrative, but inter-population differences come into particular focus with a higher resolution examination of the different Study SRL

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<sup>120</sup> *Ibid*; Netolitzky, “Repeat Litigants”, *supra* note 26 at IV(E).

<sup>121</sup> *Bernard v Canada (Professional Institute of the Public Service)*, 2020 FCA 211 provides a model approach to this step.

<sup>122</sup> Netolitzky, “Appellants”, *supra* note 24 at 170.

appellant types. Comparing SRLs and represented appellants, FCA appeal proceedings take similar time to complete (Table 5; Figure 26A) and involve the same number of filings (Table 11), unless the SRL is a Known Vexatious Litigant. Docket document and record volume, and R values, indicate litigation initiated by SRLs does tend to involve more Registry activity, but, once again, the most resource-intensive litigation was that initiated by Known Vexatious SRLs. Not all SRLs are the same.

To date most discussion about SRLs has focused on SRLs themselves, their needs, and their complaints. The SRL narrative acknowledges SRLs require additional court resources. We now see that is not entirely correct. Some SRLs take up much more court time than others. Those are the SRLs that Canadian courts have attempted to rein in using prospective litigation management steps.

It is time to be realistic about this population. Expert investigators say their conduct and distorted motivations are the result of mental health disorders<sup>123</sup> and/or extremist political agendas.<sup>124</sup> This study shows this litigant category are highly active. They do not abandon litigation unless the court shuts it down. There is no “case management litigation discount” that results from half-measures to interdict their activity.

Some appeal courts have observed the harm these abusive SRLs cause to their function. Front-line and registry staff are particularly vulnerable.<sup>125</sup> Court Clerks and Registry staff have a professional obligation to facilitate court access and assist litigants, yet they have few, if any, means to protect themselves from abuse. These court actors have no authority to judge the substance and merit of litigation.<sup>126</sup> They are not gatekeepers but conduits.

The harm that flows from individual encounters - at the court counter, in chambers, in hopeless applications, in indeterminate interlocutory appeals, in complaints to managers and government officials and the Canadian Judicial Council - each of these are, in themselves, small. But as Ovid observed, “add little to little and there will be a big heap”. Water grinds stone. The harm experienced by Canadian courts is accumulative. The disturbing volume and intensity of abusive litigation identified in this investigation shows things are not well at the FCA. In any case, that Court has long been saying exactly that.<sup>127</sup> The data here simply documents and validates its complaint.

Canadian court and litigation processes can be measured. This study illustrates that detailed, quantified, statistically-reliable investigations of litigation and litigants are possible. There is no need to guess about Canadian litigation, or resort to less reliable and subjective (and often more expensive) information gathering techniques such as surveys, except when the critical issue is the subjective intentions,

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<sup>123</sup> Caplan & Bloom, *supra* note 118; Mullen & Lester, *supra* note 118; Morissette, *supra* note 15.

<sup>124</sup> Morissette, *supra* note 15; Netolitzky & Warman, *supra* note 75; Jessica K Phillips, “Not All Pro Se Litigants Are Created Equally: Examining the Need for New Pro Se Litigant Classifications through the Lens of the Sovereign Citizen Movement” (2016) 29:4 *Geo J Leg Ethics* 1221; Donald J Netolitzky, “A Revolting Itch: Pseudolaw as a Social Adjuvant” (2021) 22:2 *Politics, Religion, and Ideology* 164. Psychiatrists are now reconsidering their historic resistance to classifying extremist belief, including belief in pseudolaw, as a form of mental disorder: Joseph M Pierre, “Integrating Non-Psychiatric Models of Delusion-Like Beliefs into Forensic Psychiatric Assessment” (2019) 47:2 *J Am Acad Psychiatry Law* 1. Threat assessment expert Meloy classifies pseudolaw as a DSM-5 “extreme overvalued belief”: Tahir Rahman, Lingjin Zheng & J Reid Meloy, “DSM-5 cultural and personality assessment of extreme overvalued beliefs” (2021) *Aggression & Violent Behavior* (in press), online (pdf): [drreidmeloy.com <drreidmeloy.com/wp-content/uploads/2021/01/2021\\_AgressionAndViolentBehavior.pdf>](https://drreidmeloy.com/wp-content/uploads/2021/01/2021_AgressionAndViolentBehavior.pdf) [perma.cc blocked].

<sup>125</sup> *Lochner*, *supra* note 32 at para 18.

<sup>126</sup> *R v Verma*, 2016 BCCA 307 at para 20. The Federal Courts are unusual in that their Registry staff are at least authorized to refer “irregular” filings for review: *FC Rules*, *supra* note 53, s 72.

<sup>127</sup> See e.g. *Ohumide*, *supra* note 105; *Fabrikant v Canada*, 2018 FCA 224 at para 25; *Virgo v Canada (Attorney General)*, 2019 FCA 167 at paras 29-30.

experiences, and perceptions of justice system participants.<sup>128</sup> A particularly effective way to understand litigation phenomena is to first build a foundation of statistically valid, objective data distilled from court and litigation documentary sources, then upon that collect and evaluate subjective observations and experiences.<sup>129</sup>

The data needed to understand how Canadian legal processes operate already exists. Why so little Canadian legal research to date has used court documents and records is difficult to understand. That information is, in some instances, readily accessible, and may be mined and evaluated. The COVID-19 pandemic has now required Canadian courts take the long overdue step of shifting to electronic documents and online records. That promises even more data resources will soon be available to enable and facilitate court document- and record-based research.

Much remains uncharacterized and undescribed. Further studies will plausibly confirm long held beliefs. Other outcomes will be a surprise, such as how this investigation suggests TCC and FC SRL litigation may be very different. Measurement of Canadian litigation is critical to evaluate whether courts or other dispute resolution mechanisms are better suited to efficiently and effectively resolve disputes.<sup>130</sup> Quantitative data-based investigations like this article can be readily conducted as an undergraduate term paper or graduate degree project. Courts, too, can investigate and report on their own processes. All this will help. The authors encourage others to join in this effort. Together, we can assemble an accurate picture of what goes on in Canadian courts, piece by piece by piece. Good data means good policy is possible.

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<sup>128</sup> Arguably, some of the most interesting survey-related data is when that reporting is wrong or distorted. For example, certain non-Canadian investigators report an over-emphasis concerning persistent and vexatious SRLs: Greacen, “Impact”, *supra* note 17 at 35; Moorhead, *supra* note 17 at 79-82, 88-91; Toy-Cronin, *supra* note 18 at 738-40, 750-53.

<sup>129</sup> Moorhead, *supra* note 17 employed this approach, using UK court records for 1,029 civil and 1,334 family trial proceedings that involved SRLs to develop a profile for UK SRL litigation.

<sup>130</sup> For example, to compare the relative efficiencies and outcomes of British Columbia courts and the British Columbia Civil Resolution Tribunal: Shannon Salter, “Online dispute resolution and justice system integration: British Columbia’s Civil Resolution Tribunal” (2017) 34(1) WYAJ 112. US and Canadian investigators claim there is an even broader category of legal disputes that are not captured by formal dispute resolution mechanisms: Sandefur, *supra* note 18; Trevor C W Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) [unpublished], online (pdf): *Canadian Forum on Civil Justice* <[www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf](http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf)> [perma.cc/9KUW-7KVE].